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No. 2906

Re 2905

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES H. RUDDOCK and TIMOTHY H. McCARTHY, Plaintiffs,

Appellants

vs.

CLALLAM COUNTY, a Municipal Corporation, and CLIFFORD L. BABCOCK, Treasurer, Defendants,

Appellees

RECORD ON APPEAL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

SHERMAN PRINTING AND BINDING CO., SEATTLE, WASH.

NO.....

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RECORD ON APPEAL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

SHERMAN PRINTING & BINDING CO., SEATTLE, WASH.

No. 37

INDEX TO PRINTED TRANSCRIPT OF RECORD

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

CHARLES H. RUDDOCK and
TIMOTHY H. McCARTHY,
Plaintiffs and Appellants,

vs.

CLALLAM COUNTY, a municipal corporation, and Clifford L. Babcock, Treasurer,
Defendants and Appellees.

IN EQUITY—NO. 37

NAMES AND ADDRESSES OF COUNSEL

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627 Colman Building, Seattle, Washington.

STATEMENT

Time of commencement of suit, May 29, 1914.

Names of parties to suit: Charles H. Ruddock and Timothy H. McCarthy, Plaintiffs and Appellants; Clallam County, a municipal corporation, and Clifford L. Babcock, Treasurer, Defendants and Appellees.

Dates of filing respective pleadings:

Plaintiffs' bill of complaint filed May 29, 1914.

Defendants' motion to dismiss plaintiffs' bill of complaint filed June 18, 1914.

Memorandum decision denying motion to dismiss, filed October 26, 1914.

Order denying motion to dismiss, filed October 30, 1914.

Defendants' amended answer to amended complaint, filed January 18, 1915.

Stipulation of parties with reference to complaint, amended answer and second amended answer, filed November 6, 1916.

On September 1, 1915, before the Hon. E. E. Cushman, Judge, this cause, in conjunction with Equity Cause No. 36, entitled Clallam Lumber Company, a corporation, Plaintiff, vs. Clallam County, a municipal corporation, and Clifford L. Babcock, Treasurer, Defendants; Equity Cause No. 56, entitled Clallam Lumber Company, Plaintiff, vs. Clallam County, a municipal corporation, and Herbert H. Wood, Treasurer, Defendants, and Equity Cause No. 57, Charles H. Ruddock and Timothy H. McCarthy, Plaintiffs, vs. Clallam County, a municipal corporation, and Herbert H. Wood, Treasurer, Defendants, the same being consolidated for trial, were tried upon the testimony of witnesses produced before the court, and upon exhibits offered in evidence by the respective parties, which have been returned and filed herein, and upon the depo-

sitions taken under stipulation of the parties and exhibits annexed thereto.

Counsel for the respective parties appeared and argued said cause in open court and thereafter submitted briefs to said court.

Thereafter, on January 22, 1916, the Judge before whom said causes were tried and heard made and filed his memorandum decision.

Decree was made and entered and filed in said cause on February 3, 1916.

Plaintiffs made and filed petition for rehearing March 3, 1916.

Argument had on petition to rehear before Hon. E. E. Cushman, Judge, and taken under advisement by him April 18, 1916.

Memorandum decision on petition to rehear rendered and filed by Hon. E. E. Cushman, Judge, May 11, 1916.

Final order denying petition for rehearing made and filed May 15, 1916.

Journal entry of said court adjourning the November term and opening the May term of court May 2, 1916.

Assignment of errors, petition for appeal, allowance of appeal, bond on appeal with approval thereof, filed October 27, 1916.

Citation on appeal issued, served and filed October 27, 1916.

Statement of Facts certified by Judge. Filed Oct. 27, 1916.

Order of Court, E. E. Cushman, Judge, enlarging time to docket case on Appeal and return of citation made and entered November 2, 1916.

Order of Judge of U. S. Circuit Court of Appeals, Ninth Circuit, on stipulation of parties that this cause be heard on Statement of Facts printed in Cause Clallam Lumber Co. vs. Clallam County, on appeal to this same term, made Dec. 12, 1916.

NO. 37
BILL OF COMPLAINT

To the Judge of the District Court of the United States, for the Western District of Washington, Northern Division, sitting in Equity:

The plaintiffs, Charles H. Ruddock and Timothy H. McCarthy, bring this their bill of complaint against Clallam County, a municipal corporation, and Clifford L. Babcock, treasurer of said county, and, humbly complaining, respectfully show unto your honor as follows:

I.

The plaintiff, Charles H. Ruddock, is a resident, a citizen and an inhabitant of the City of New York, State of New York, and Timothy H. McCarthy is a citizen, a resident and an inhabitant of the City of New Orleans, Louisiana.

II.

That at all the times herein mentioned, the defendant County of Clallam, was and now is a county of the state of Washington, situate in the Northern Division of the Western District thereof, and as such a municipal corporation under the constitution and laws of said state and a citizen of the state of Washington.

III.

That at all the times herein mentioned the defendant Clifford L. Babcock was and he still is the duly elected, qualified and acting treasurer of said county of Clallam, and a citizen of said state of Washington, and a resident and inhabitant of Clallam County, in the Northern Division of the Western District thereof.

IV.

The matter in controversy in this suit exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3000.00), and is, to-wit: approximately the sum of Nine Thousand Dollars ($9000) and over.

V.

The plaintiffs are the owners of certain timber lands situate in said Clallam County, a list of which,

containing the correct description thereof, is hereto attached and marked Exhibit "A" and made a part hereof. The said lands contain in the aggregate 7941.06 acres of land according to the government survey, more or less. These plaintiffs have been the owners of said lands for four years, or thereabouts, last past, and more. The said lands constitute substantially a solid body lying in the interior of Clallam County along the valleys of the Sol Duc and Calawa Rivers.

VI.

For the purpose of assessment for taxation and as a basis thereof, the assessing officers, of Clallam County have from time to time, during the last five or six years, caused timber lands in said county to be cruised, and the cruises and estimates thus made to be adopted by the county. Most of the timber lands in the county owned by private parties, as distinguished from the Government lands, have now been cruised, and all of the lands owned by these plaintiffs have been so cruised, and so far as respects timber lands within the county, upon which cruises have thus been made, it is claimed by the assessing officers that the same have been assessed upon the basis of the cruises thus obtained. The assessments made by the assessing officers of the county have been made, however, according to certain zones or districts which the assessing officers have arbitrarily, unreasonably and unlawfully laid off and determined without reference to and in disregard of the true or fair value in money of timber on the lands within such zones or districts respectively.

VII.

One of these zones thus arbitrarily laid out abuts immediately upon the Straits of Fuca and extends east and west along the Straits for a distance of approximately sixty-five miles, and extends back from the Straits into the interior distances varying approximately from three to eight miles. Within this zone are included those timber lands which, of all timber lands within the county, are of the greatest value, not merely because the timber thereon is of excellent quality, but particularly because of the location thereof, the same

being situate immediately upon tide-water or adjacent thereto, and thus rendered immediately accessible to the markets of the world. Within this zone the timber is valued for the year 1913, by the assessing officers of Clellam County, as follows: Fir, spruce and cedar at 80c per thousand feet; hemlock at 40c per thousand feet. In this and all other zones, in addition to the value placed by the assessing officers on the timber, there was for the year 1913 placed upon the lands themselves a value of $1.00 per acre, and the same, in the case of these plaintiffs' lands, was done arbitrarily, unreasonably and unlawfully and without any reference to the actual value thereof. Many of the lands owned by the plaintiffs are of no value whatsoever independent of the timber standing or being thereon.

VIII.

Another zone thus arbitrarily, unreasonably and unlawfully set off by the assessing officers lies in the Western part of Clallam County. No part thereof lies nearer to the Straights than approximately four to six miles, and no lands within this zone owned by the plaintiffs lie nearer to the Straits than approximately nine miles and the great body of the lands owned by these plaintiffs within this zone, lie much more distant therefrom. Said zone or district is irregular in form and extends southerly until it reaches the line of Jefferson County, a distance of approximately thirty miles from the Straits of Fuca. There are no harbors upon the Pacific Ocean within the County of Clallam or Jefferson at or through which the timber on the lands of the plaintiffs might or could be brought to market. Within the zone or district described in this paragraph, there is a large acreage of land and upon the timber lands within this zone the assessing officers of Clallam County put for the year 1913, for the purpose of taxation, the following values, to-wit: Upon fir, spruce and cedar timber, a valuation of 70c per thousand feet; and upon hemlock, a valuation of 35c per thousand feet. In this zone the plaintiffs own lands approximately 7,941 6/10 acres in extent, and the timber upon

the same according to the cruise made by the County of Clallam, amounts in the aggregate to approximately 1,230,041¼ M feet of all sorts, as more fully set forth in Schedule "B" hereto attached and made a part hereof. The value of the lands of the plaintiffs within this zone as fixed and determined by the assessing officers for Clallam County for the year 1913, for the purposes of taxation is $479,990.00. All the lands owned by these plaintiffs within this zone are separated from the Straits of Fuca by a range of mountains.

IX.

It has been the practice and custom throughout the state of Washington for four years or more last past, for the assessing officers and boards of equalization to assess and equalize property for the purposes of taxation, at less than its actual and full value, the assessors and taxing officers of the various counties assuming some arbitrary standard which has usually been from 35 to 50% of the actual value of the property taxed. This has been known to and acquiesced in by the State Board of Equalization in equalizing such taxes. The assessor of the County of Clallam announces and pretends that for the year 1913 he assessed taxable property within the County of Clallam at and upon the basis of fifty-three per cent. of the true and fair value thereof in money; and the members of the County Board of Equalization announced and pretend that they equalized and approved the assessments upon the taxable property within said county for such year at and upon the same basis. But these plaintiffs aver that such claims and pretenses are untrue in fact, and that the interior timber lands in said county, and in particular the lands owned by these plaintiffs, were and are valued for the purposes of taxation in the year 1913, at sums greatly in excess of 53% of the true and fair valuation thereof in money; that the other properties, real and personal, in said county, were valued at sums much less than 53% of the true and fair value thereof in money; and that these plaintiffs were grossly and intentionally discriminated against by the assessing officers of Clallam

County in the matter of assessment and taxation upon their lands for the year 1913.

X

The timber upon the lands of the plaintiffs as shown by the cruise thus made by the County of Clallam, amounts in the aggregate to approximately 1,230,-041¼ M feet of all sorts, as more fully shown by Schedule "C" attached hereto and made a part hereof. The assessments on the lands of plaintiffs for the year 1913 were made upon the basis of said cruise, and these plaintiffs aver that the timber upon their lands was greatly over-valued by the assessing officers of Clallam County in the valuations put thereon by them for the purposes of taxation in the year 1913. The valuations thus placed by the assessing officers of Clallam County upon the lands of these plaintiffs described in Exhibit "A" hereto attached, for the purposes of taxation, for the year 1913, amount in the aggregate to $479,990.00. These plaintiffs aver that the true and fair value in money of said lands does not exceed the sum of $550,000. Dollars, and did not exceed that sum in the year 1913, when said assessment was made. Such assessment was therefore made upon the basis of approximately eighty-seven per cent. of the true and fair value thereof in money. No property in said Clallam County, except the timber lands owned by the plaintiffs, and perhaps certain other timber lands similarly situated in the interior of said county, were assessed in said year 1913 at so great a proportion of the true and fair value thereof in money. Such assessment upon the lands of the plaintiffs at so large a percentage of the true and fair value thereof in money, was not accidental or unintentional on the part of said assessing officers of Clallam County, but was intentional and willful, and, as these plaintiffs aver, was in pursuance of a concerted effort and corrupt and unlawful combination and conspiracy between the assessor of Clallam County and the other members of the County Board of Equalization of said County of Clallam. Some of the facts relating to the nature of said combination and conspiracy and to the unlawful assessment so made are hereinafter set forth.

XI.

The timber lands in the County of Clallam are situate for the most part in the westerly end thereof, the timbered portion of the county owned by private parties and subject to assessment being situate almost entirely within that portion of the county lying west of Range eight and extending from thence practically to the Pacific Ocean. This territory is sparcely settled, containing only a few inhabitants at the most, and those settled for the greater part at Forks and Quillayute Prairies (so-called). Comparatively few of the voters of the county, therefore, reside in the west end district. The county seat of the county is the City of Port Angeles, in the middle district, said city containing a population approximately 5000 in number. In the east district (so-called) are prosperous farming communities, the same being well settled, particularly in the vicinity of Sequim and Dungeness, the population in said east district being approximately 1500 in number. The voting power of the county is, therefore, in the east and middle Commissioner's districts, and particularly in that easterly portion of the county extending from and including Port Angeles to the East County line, the voters in the west district being so few that they have little voice in the county affairs. The lands in the west end of the county, being almost entirely timbered lands, except at the small prairies of Forks and Quillayute, are incapable at the present time of supporting any considerable population. They are mostly owned by non-residents of said county.

XII.

The assessing officers of the county of Clallam (with the exception of one county commissioner from the west district) are elected by the votes of those resident in the Middle and East district, because of the preponderance of votes in those districts, and for the purpose, as these plaintiffs aver, of ingratiating themselves with their constituents and serving their own individual and selfish ends, the said assessing officers of Clallam County have wrongfully, unlawfully, and corruptly combined and concerted together with the

intent and purpose to increase the assessments upon the timber lands in the west end of the county beyond their proportion of the true and fair value of the property within the county, and to lower and depreciate the assessments upon the property in the City of Port Angeles, and contiguous thereto or in that vicinity, the farming lands in the east end of the county and other properties within the county, and especially in the middle and east districts thereof, and to assess the same upon a basis and at valuations far below their proportion of the true and fair value of the property, subject to assessment in Clallam County. In pursuance of this combination and conspiracy it has been the custom of the assessor of the County of Clallam to consult and advise with the other members of the County Board of Equalization, or with all those resident in the middle and east districts, in making his assessment rolls, and that custom, as these plaintiffs are informed and believe, was followed by the assessor in making his rolls for 1912 and 1913. The assessment roll, as prepared by the assessor, does not, therefore, and in each of the years above mentioned did not, represent the judgment of the assessor, but was and is the result of the combination and conspiracy with other members of said County Board of Equalization, and this roll, thus prepared by the assessing officer, is approved as a matter of course, in all substantial respects, and particularly as relates to assessments of timber lands, by the County Board of Equalization when it meets to review the same. As a result, no fair hearing as contemplated by statute, is possible to be had on appeal to said Board. And these plaintiffs aver that this practice has been followed in Clallam County for several years continuously last past, and that, when these plaintiffs appealed to said Board in the year 1910, their attorney addressed said board at the opening of its session, and was told in substance by one of the members of said Board, speaking in its behalf, that it was needless to introduce any evidence of values of timber lands for no such evidence would change the views of said Board.

XIII.

In the years 1912 and 1913, and prior thereto, gross discriminations were practiced by the assessing officers of Clallam County against your plaintiffs and other owners of timber lands in the interior of the county and in favor of other owners of property subject to taxation in Clallam County. These discriminations were aimed in particular at these plaintiffs and other owners of interior timber, for the reason that they own large bodies of lands in said county, but control no votes and exercise no political influence therein, and the size of their holdings has constituted an inducement to said assessing officers to place a large and greatly disproportionate share of the taxes levied within the county upon these plaintiffs and such other owners of interior timber, and thereby relieve other property owners within the county of some portion of that burden of taxation which, under the Constitution and laws of Washington, equitably and lawfully falls upon them. These discriminations thus practiced against these plaintiffs have been and are with the intent and purpose to favor, at the expense of the plaintiffs and other owners of interior timber lands, all owners of property at Port Angeles and in the vicinity thereof, all owners of property in the East district (so-called), all owners of personal property throughout the county and likewise the owners of timber lands immediately upon the Straits.

XIV.

The plaintiffs have caused diligent and careful examination to be made of the assessment rolls of Clallam County for the years 1912 and 1913, and a like examination of property values within the county, and as a result thereof now find that the lands and other properties situate at Port Angeles and subject to taxation, are valued upon said assessment rolls as equalized for such years at not to exceed 10 to 20 per cent. of their true value in money. The County Board of Equalization of Clallam County is, and for the years 1912 and 1913 was composed of five members of whom three are the county commissioners and the other two

are the county treasurer and the county assessor respectively. Of said members of the Board one County Commissioner, representing the middle district, resides at Port Angeles, and is Chairman of the Board. The County Treasurer and County Assessor also reside at Port Angeles. A fourth member resides in the east district, and the remaining member in the west district. Three out of the five members of the County Board of Equalization are therefore residents of Port Angeles, and the major part of the population of the county is also found at Port Angeles. These members of the Board resident at Port Angeles are themselves owners of property at Port Angeles. In order to favor themselves and their constituents at Port Angeles aforesaid, the three members resident at Port Angeles have combined and conspired with the East End Commissioner to put low valuations upon the property at Port Angeles and vicinity, and high and unequal valuations upon the timber lands situate in the west end of the county and in particular upon the timber lands of these plaintiffs and other owners of timber lands in the interior of Clallam County.

XV.

As the result of diligent and careful examination made by these plaintiffs of the assessment rolls of Clallam County for the years 1912 and 1913, and a like examination of the property values within the county, these plaintiffs find that the farming lands and other properties situate in the east end subject to taxation are valued upon said tax rolls as equalized for such years, at not to exceed 25 to 30% of their true and fair value in money.

XVI.

As the result of diligent and careful examination made by plaintiffs of the assessment roll of Clallam County for the years 1912 and 1913, and a like examination of the property of others within the county, plaintiffs find that the personal property within said county consisting of stocks and goods, wares and merchandise at Port Angeles, and other personal properties situate at Port Angeles and elsewhere within the coun-

ty, are valued by the assessing officers of Clallam County for the year 1913 at not to exceed 10% to 15% of their true and fair value in money.

XVII.

The lands owned by the plaintiffs lie, as hereinbefore stated, in the valleys of the Sol Duc and Calawa Rivers and upon the benches and ridges between the same or adjacent thereto. These lands are at present wholly destitute of facilities for transportation and it is impossible to bring the timber thereon into the market. In order to bring said timber to market it is necessary that facilities be provided for transportation to Gray's Harbor on the south or to the Straits of Fuca on the north. Gray's Harbor is far distant, no railroad from that direction extending farther north than Moclips, a distance of more than sixty miles from the lands of your plaintiffs. Few of the lands of the plaintiffs are less than twelve miles from the Straits and most of them lie a still greater distance therefrom, and all of said lands of the plaintiffs are cut off from the Straits by the range of mountains running east and west through the County of Clallam. It is therefore impossible to bring the timber from plaintiffs land to market except by transporting the logs or lumber cut therefrom across this range of mountains. This cannot be accomplished except by the construction of a railroad at great expense. This expense is beyond any present means at the command of the plaintiffs and is likewise an expense which, in the present conditions of the lumber market, or in any conditions of the lumber market which have at any time heretofore prevailed on the Pacific Coast, is prohibitive. This fact fact has a direct and important bearing on the present value of the plaintiffs land. Upon the Straits of Fuca, however, and immediately adjoining tide-water, there lie fine bodies of fir, spruce, cedar and hemlock timber, which can readily be logged to the Straits at the present time. Extensive logging operations have for many years been carried on and are now being carried on in this portion of Clallam County lying immediately upon the Straits. This Straits timber (so-called) is

in the zone or district arbitrarily, unreasonably and unlawfully laid off by the assessing officers as recited in paragraph VII, in which zone or district the timber is valued for the year 1913 by the assessing officers of Clallam County as follows: Fir, spruce and cedar at 80c per thousand feet, and hemlock at 40c per thousand feet; whereas upon the lands of these plaintiffs which lie within the interior of the county and separated from tide water by a range of mountains, the timber is assessed at slightly lower figures, being for the most part 70c or 60c for fir, spruce and cedar, and 35c or 30c for hemlock. These plaintiffs say that the true and fair value in money of said timber so lying upon tide-water or adjacent thereto, is at least twice the true and fair value in money of the timber on these plaintiffs lands.

XVIII.

The City of Port Angeles, where the majority of the voters of Clallam County reside, is situate at tide-water and upon a harbor which it is the wish of the inhabitants of said city may become the seat of a considerable commerce. To this end there is an ardent desire on the part of the inhabitants of Port Angeles that the timber owners of Clallam County build mills at Port Angeles, construct railroads into the interior of the County, transport logs from the interior of the County to Port Angeles, and saw the same into lumber at that city, thereby adding to the growth and development of Port Angeles as respects both industries and population. Various of the inhabitants of Port Angeles, including the assessor, have complained to these plaintiffs that, because they failed to build saw-mills and railroads or cause the same to be done, it had pursued and was pursuing a policy hostile to the true interests of the county and especially of Port Angeles, and that such interests would be promoted only by building saw-mills and railroads; and these plaintiffs aver that, as part of the combination and conspiracy aforesaid, it is the purpose of the assessing officers of Clallam County, representing, as they believe, the sentiment among the voters at Port Angeles, to assess the tim-

ber lands in the West end of Clallam County at exorbitant sums, as a means of compelling the erection of mills at Port Angeles, the construction of railroads into the interior of the county, and the commencement and carrying on of logging and lumbering operations within the county. In particular it has been and is a part of said combination and conspiracy to compel the plaintiffs, as some of the large timber land owners of Clallam County, to erect such mills and construct such railroad and commence and conduct lumbering operations; and through influential citizens of Port Angeles, these plaintiffs have been assured that, if they would begin to operate their timber and employ a considerable number of men, they might rely that they would thenceforth be fairly and equitably treated as respects taxation. The plaintiffs aver that the majority of the members of the Board of Equalization are themselves the owners of real property at Port Angeles and are, therefore, personally interested in its rapid growth and development, and desire, for their individual aggrandizement, to compel the plaintiffs to erect mills and construct railroads and commence and conduct lumbering operations, despite the fact that no such operations can be conducted with profit in the market conditions now prevailing.

XIX.

The plaintiffs aver that the unequal, discriminating and unlawful assessments which are herein complained of are not accidental or unintentional on the part of said assessing officers of Clallam County, but that the same are the direct and immediate result of a corrupt and unlawful intent on the part of the County Assessor for the County of Clallam, and the members of the county Board of Equalization of said County, or the majority of said members, to discriminate against the timber land owners in the West end of said County, and particularly against the plaintiffs in the matter of taxation, and in favor of all owners of property in the middle and East districts of the county, and unjustly and illegally to overvalue the property of the plaintiffs for purposes of taxation and to under-

value, for the purposes of taxation, other lands and properties within said County of Clallam, including all property situate in Port Angeles or the vicinity thereof, all farming properties in the East end of said county of Clallam, and all other properties, real or personal, in the middle and East districts, as well also as certain other timber lands in said county situate within the zone lying immediately upon the Straits, as set forth in paragraph VII of this bill.

XX.

The plaintiffs aver that by Section 9112 of Volume 3 of Remington & Ballinger's Annotated Codes and Statutes of Washington, it is provided that all property shall be assessed at not to exceed fifty per cent. of its true and fair value in money; that the true and fair value in money of the lands owned by your plaintiffs and particularly described in Exhibit "A" hereto attached, with the timber standing thereon, does not exceed the sum of $550,000.00 and did not exceed that sum when the assessments of 1912 and 1913 were made; that under said statute of the State of Washington any assessment of said lands for purposes of taxation at a sum greater than $275,000.00 is unjust, illegal and void; that the true and fair value in money of the lands so owned by the plaintiffs is known to the assessor of said county of Clallam, as well as to the members of the County Board of Equalization thereof, and was so known at the time of the making of assessment and at the time of the approval thereof by said Board of Equalization; but that, wholly disregarding the duty thus placed upon them by the law to assess said lands at no greater sum than one-half their true and fair value in money, the said assessor and the said Board of Equalization fraudulently and unlawfully caused the same to be assessed at a sum exceeding, by at least $204,990, the 50% of the true and fair value in money of said lands, contrary to the provisions of the statute above specified, and that such over-assessment was made and approved by said assessing officers with the fraudulent and corrupt intent of placing upon your orator the burden of an exces-

sive and unjust proportion of the taxes, levied and collected within said County of Clallam for said year. The taxes levied for the year 1913 by the officers of Clallam County upon the lands owned by your orator, and described in Exhibit "A", amount, in the aggregate, to the sum of $15,809.00 as shown by the tax roll of said county for that year, whereas had such taxes been levied upon the true and fair value in money of the aforesaid lands, the same would not have exceeded the sum of $9,250.00; and your plaintiffs aver that by the fraudulent and unlawful practices of the assessing officers of Clallam County, of which complaint is herein made, there were and are unlawfully, unjustly and fraudulently imposed upon its lands described in Exhibit "A" taxes for the year 1913 to the amount of at least sixty-five hundred and fifty-nine dollars, in excess of all taxes which might or could equitably or unlawfully be imposed thereon.

XXI.

The overvaluation of the lands of the plaintiffs and other owners of interior timber, and the undervaluation of other property in said county, of which complaint is herein made, are in pursuance of a definite, settled policy, design and plan systematically adopted by said assessing officers and practiced for several years last past. The plaintiffs aver that the assessment of the lands of the plaintiffs and other owners of timber lands in the interior of Clallam County at sums which are proportionately much higher than the assessments imposed upon the other properties, real and personal, in said county, is and results in an actual fraud upon the plaintiffs, and the said plan so resulting in such fraud upon the plaintiffs was and is arbitrarily and systematically adopted and carried out by the assessor and members of the County Board of Equalization and by the defendants herein.

XXII.

The assessments upon the lands of the plaintiffs were made by the Assessor of said County for the year 1912 at the high, excessive, unlawful and illegal rates herein specified, and upon the unlawful and fraud-

ulent basis herein mentioned. Thereafter the County Board of Equalization met ostensibly to consider and review the assessment roll. But such review was ostensible, specious and fraudulent in character, the members of the Board having already combined and conspired with said Assessor to make the assessments upon the basis and at the amounts hereinbefore mentioned. The plaintiffs, through their managing officer and attorneys, appeared before the County Board of Equalization when the same was sitting at its regular session in 1912, and protested against said excessive, unjust and unlawful assessments upon its lands. Such protest was both oral and in writing. The protests so made were arbitrarily disregarded and overruled by said Board, and the petition so filed by the plaintiffs to equalize its assessments and put the assessments on the property of the plaintiffs on the same basis as the assessments upon other property in said County, was arbitrarily denied.

XXIII.

The assessments upon the lands of the plaintiffs were made by the Assessor of said County for the year 1913, at the high, excessive, unlawful and illegal amounts and rates herein specified, and upon the unlawful and fraudulent basis herein mentioned. Thereafter the County Board of Equalization met ostensibly to consider and review the assessment roll, but such review was ostensible, specious and fraudulent in character, the members of the Board having already combined and conspired with said Assessor to make the assessments upon the basis and at the amounts hereinbefore mentioned. The plaintiffs, through their attorney, appeared before the County Board of Equalization when the same was sitting at its regular session in 1913 and protested against said excessive, unjust and unlawful assessments upon its lands.

The protests so made, both orally and in writing, were arbitrarily disregarded and overruled by said Board, and the petition of the plaintiffs to equalize their assessments and put the same on the same basis as

the assessments upon other properties in said County, was arbitrarily and unlawfully denied.

XXIV.

Thereafter the taxes were extended against the lands of the plaintiffs upon the tax rolls and books of said County, the same being so extended upon the basis of the high, excessive, unlawful and fraudulent assessments upon the lands of these plaintiffs of which complaint is herein made. Said tax rolls and books were delivered to the defendant Clifford L. Babcock, Treasurer of said County, and said Clifford L. Babcock, as such Treasurer, has demanded payment of said illegal, fraudulent and arbitrary taxes assessed and levied in manner as hereinbefore specified. The taxes so demanded by said Clifford L. Babcock, Treasurer of said County, amount, in the aggregate to the sum of $158 09, and said Treasurer, unless restrained by the order of this Court, will sell the property of the plaintiffs to satisfy the taxes thus fraudulently and unlawfully assessed and levied.

XXV.

That upon the 28th day of May, 1914, the plaintiffs tendered and offered to pay to said Clifford L. Babcock, treasurer of Clallam County, and to said Clallam County, the defendants herein, the full and true sum of $9,250.00 Dollars, lawful money of the United States, in payment of the taxes levied upon their lands in said Clallam County, for the year 1913; and the plaintiffs aver that the sum thus tendered is more than the taxes justly and equitably due from the plaintiffs to the defendants upon their lands aforesaid for such year, including all penalties, interest and costs, and more than the full amount which the plaintiffs would be required to pay if their property were assessed upon the same basis as all other property in Clallam County, or if said assessments were legal and equitable or equal and uniform with or compared to the assessments upon all other property within said county. The plaintiffs herewith bring into court the sum of money in this paragraph specified and tender and offer to pay, and do hereby pay the same, to and for the use and benefit

of the defendant County of Clallam, and the plaintiffs offer to pay and will pay any such other or further amounts as the court may find to be justly due from them or equitably owing by them to said County of Clallam. And the plaintiffs aver that the taxes upon their said lands for all years prior to 1913 have been paid and that the taxes for the year 1913 have been paid and discharged by the tender and payment herein specified.

XXVI.

The plaintiffs aver that by reason of the facts hereinbefore recited, the assessment of the plaintiff's lands for taxation for the year 1913 is arbitrary, unjust, illegal, and fraudulent, as compared with the assessment of all other property in said Clallam County, and that such unlawful and fraudulent assessment is prohibited by the Constitution of the State of Washington, and that the assessment so made is in particular, in violation of and contrary to Section 2, Article VII, of the Constitution of the State of Washington, in and by which it is provided that assessments and taxes shall be uniform and equal on all property in said state, according to its value in money, and that there shall be secured a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property, and that the assessment so made is also in violation of and contrary to Section 1 of Article VII of the Constitution of the State of Washington which declares that all property in the State, not exempt under the laws of the United States, or under said State Constitution, shall be taxed in proportion to its value. And the plaintiffs aver that in truth and in fact the taxes upon their lands, described in Exhibit "A", are not uniform and equal as compared with all other property in said County of Clallam.

XXVII.

The plaintiffs aver that if the assessment and levy of taxes for the year 1913 upon their lands in Clallam County, hereinbefore described, be not set aside, vacated and held for naught, the same will result in the

taking of their property without due process of law, and in denying to them the equal protection of the laws, contrary to the provisions of the XIVth Amendment to the Constitution of the United States, which provides that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. And the plaintiffs pray the protection afforded by said XIVth Amendment to the Constitution of the United States, and aver that this suit arises under the Constitution and Laws of the United States, and that for this reason, as well as because of the diverse citizenship of the parties, this Court has jurisdiction thereof.

XXVIII.

The plaintiffs are remediless at and by the strict rules of the common law, and are relievable only in a court of equity, where matters of this sort are properly cognizable and relievable.

XXIX.

The plaintiffs therefore ask the aid of this Court in the premises, and pray:

(a) That the County of Clallam, a municipal corporation, and Clifford . Babcock, Treasurer of said County, answer this bill without oath, answer under oath of said defendants being hereby expressly waived.

(b) That this court decree that the assessments and taxes for the year 1913, imposed by the assessing and taxing officers of the County of Clallam upon the lands of the plaintiffs are unlawful, fraudulent and void; that the same are contrary to and in violation of the Constitution and Laws of the State of Washington and the provisions of the 14th Amendment to the Constitution of the United States.

(c) That this Court determine and decree what sums were or are justly owing by the plaintiffs for the taxes for the year 1913 upon their lands in Clallam County, described in Exhibit "A" hereto attached, and what assessments and taxes upon their lands are equal and uniform with or compared to the assessments and taxes upon all other property in said County.

(d) That it be determined and decreed that the sum of $9,250.00 tendered by the plaintiffs to said defendants, is sufficient to pay all sums which were or are justly and equitably owing by the plaintiffs for the taxes for the year 1913 upon their lands in said County of Clallam, described in said Exhibit "A".

(e) That said defendants, and each of them, be permanently enjoined and restrained from attempting to collect for the taxes of the year 1913 any sum or sums whatever in addition to those already tendered, and from selling or attempting to sell the lands or property of the plaintiffs, or any part thereof, to satisfy said taxes so levied for the year 1913 upon their lands in Clallam County, and that the cloud upon the title of the plaintiffs to their said lands which exists because or by reason of such unjust, illegal and fraudulent taxes, so levied, be forthwith removed and cancelled.

(f) That said defendants, and each of them, be in like manner enjoined until the further order of this Court.

(g) That such other or further order or decree be made in the premises as the nature of the case may require, and as to the Court shall seem meet.

XXX.

May it please your Honors to grant unto the plaintiffs the writ of injunction to be issued out of and under the seal of this Court in due form of law, permanently enjoining and restraining said defendants, County of Clallam and Clifford L. Babcock, Treasurer of said County, and each of them, from attempting to collect for the taxes of the year 1913 any sum or sums whatsoever in addition to those already tendered by the plaintiffs, and from selling or attempting to sell the lands or property of the plaintiffs or any part thereof, to satisfy said taxes so levied for the year 1913 upon their lands in Clallam County; and that a writ of injunction be issued enjoining and restraining the defendants and each of them in like manner as herein prayed, until the further order of this Court.

XXXI.

May it please the Court, the premises being considered, to grant unto the plaintiffs the writ of subpoena to be issued out of and under the seal of this Court, directed to said County of Clallam, a municipal corporation, and Clifford L. Babcock, Treasurer of said County of Clallam, commanding them and each of them to appear before this Court at a date therein specified and answer this bill of complaint.

And the plaintiffs will ever pray, etc.

CHARLES H. RUDDOCK and
TIMOTHY H. McCARTHY,
Plaintiffs.

By Dan Earle.

PETERS & POWELL,
EARLE & STEINERT,
Attorneys for Plaintiffs.

United States of America, County of King, State of Washington—ss.

On this 29th day of May, 1914, before me, a Notary Public in and for the state of Washington, personally appeared Dan Earle, to me known to be the same person who subscribed the foregoing Bill of Complaint in complainant's behalf, who made oath and says that he subscribed the name of complainant to the foregoing bill of complaint; that he is properly authorized so to do; that he is the attorney of said complainants; that affiant has read the bill of complaint by him subscribed and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

VOLNEY P. EVERS,
Notary Public in and for the State of Washington, residing at Seattle.

EXHIBIT "A"

Township 28 North, Range 14 West

Section 1 Lot 2
" " 3
" " 4

"	"	5
"	"	6
"	"	7
"	"	8
"	"	9
"	"	11
"	"	12
"	"	13
"	S½ of NE¼	
"	NW of SE	
"	SW¼ of SE¼	
"	S½ of SW¼	
Section	2	Lot 5
"	"	6
"	"	7
"	S½ of NE¼	
"	NW¼ of SE¼	
"	SW¼ of SE¼	
"	NE¼ of SW¼	
"	SE¼ of SW¼	
Section	10	S½ of NW¼
"	NE of SW¼	
	11	Lot 1
"	"	2
"	"	4
"	"	5
"	"	6
"	"	10
"	"	11
"	"	12
"	"	13
"	"	14
"	N½ of NW¼	
"	SW¼ of NW¼	
Section	12	Lot 1
"	"	2
"	"	3
"	"	4
"	"	5
"	N½ of NW¼	
"	NW¼ of SE¼	

" N½ of SW¼
" SW¼ of SW¼
Section 13 Lot 1
" " 2
" " 3
" " 4
" " 5
" " 6
" " 7
" " 8
" " 9
" " 14
" NW¼ of NW¼
Section 13 SW¼ of NW¼
" SW¼ of SE¼
Section 14 Lot 1
" " 3
" " 5
" " 6
" NE¼
" NE¼ of NW¼
" SE¼ of NW¼
" N½ of SE¼
Section 15 Lot 1
" " 10
" " 12
" " 13
" SE¼ of SE¼
23 Lot 1

Township 28 North, Range 13 West

Section 3 Lot 2
" " 5
" " 6
" SW¼ of NW¼
" NW¼ of SW¼ exc. 2 acres
Section 4 Lot 1
" " 5
" " 6
" N½ of SE¼
Section 5 Lot 1, except right-of-way
" " 2, except right-of-way

" " 3
" " 4
" " 5
" " 6
" " 7
" S½ of NE¼
" S½ of NW¼
" NE¼ of SW¼
Section 6 Lot 1
" " 2
" " 3
" " 4
" " 5
" " 6
" " 8
" " 9
" S½ of NE¼
Section 7 Lot 6
" " 10
Section 8 " 1
" " 2
Section 18 SW¼ of NE¼
" SE¼ of NW¼
Section 28 SE¼ of SE¼
Section 33 NE¼ of NE¼
" Lot 1
" " 5

Township 29 North, Range 13 West

Section 19 SE¼ of SE¼
Section 20 S½ of SE¼
Section 20 NW¼ of SW¼
" SW of SW¼
21 Lot 4
" NW¼ of SW¼, except right-of-way
" SW¼ of SW¼, except right-of-way
Section 22 SW¼ of NE¼, except right-of-way
" NW¼ of SE¼
" SW¼ of SE¼
" NE¼ of SW¼
" SE¼ of SW¼
" Lot 3

Section 27	NW¼ of NE¼
"	SW¼ of NE¼
"	NE¼ of NW¼
"	SE¼ of NW¼
"	SW¼
Section 28	Lot 6
"	NW¼ of NW¼, except right-of-way
"	SW ¼of NW¼, except right-of-way
"	S½ of SE¼
Section 29	NE¼
"	NW¼
"	NE¼ of SE¼, except right-of-way
"	NW¼ of SE¼
"	N½ of SW¼
"	Lot 1, except right-of-way
"	" 2
"	" 3
"	" 4
"	" 7
"	" 8
"	" 9, except right-of-way
Section 30	SE¼ of NE¼
"	N½ of SE¼
"	Lot 6
"	" 7
"	" 8
"	" 9
31	N½ of NE¼
"	SW¼ of NE¼
"	SE¼
"	SE¼ of SW¼
"	Lot 4
"	" 5
"	" 6
"	" 7
"	" 9
Section 32	" 1
"	" 2, except right-of-way
"	" 3
"	" 4
"	" 5

" NW¼ of NE¼, except right-of-way
" SE¼ of NE¼
" SW¼ of NE¼, except right-of-way
" NE¼ of SE¼
" NW¼ of SE¼, except right-of-way
" S½ of NW¼
" SE¼ of SE¼
" SW¼ of SE¼, except right-of-way
Section 33 NW¼ of NE¼
" S½ of NE¼
" Lot 2
" SE¼ of NW¼
" SE¼
Section 34 NW¼ of NE¼
" SW¼ of NE¼
" NE¼ of NW¼
" SE¼
" SW¼
35 SW¼

EXHIBIT "B"

Fir	742,325¾	M
Spruce	237,429	M
Cedar	10,402¾	M
White Fir	3,377½	M
Hemlock	235,826¼	M
Larch	298	M
Pine	382	M
	1,230,041¼	M

POLES
108,927
TIES
200,934

Indorsed: Bill of Complaint. Filed May 29, 1914.

No. 37

DEFENDANTS' MOTION TO DISMISS PLAINTIFFS, BILL

Come now the defendants in the above entitled action, appearing by J E Cochran, County Attorney for Clallam County, Washington, J E Frost, C E Riddell and Edwin C Ewing, attorneys for the defendants, and

respectfully move the court for an order dismissing the bill of plaintiffs upon the grounds and for the reasons following:

I

Because the plaintiffs at all times mentioned in their said bill of complaint have had a plain, speedy and adequate remedy under the statutes of the State of Washington.

II

Because it fully appears in plaintiffs' bill of complaint that the matters and things therein alleged and complained of have long been acquiesced in and consented to by plaintiffs, and plaintiffs are in equity and good conscience denied from controverting their justice and legality.

III

Because the facts alleged in plaintiffs' said bill of complaint are not in violation of any constitutional or statutory provision nor of any rule or principle of justice or equity, but on the contrary are in compliance with both law and equity

IV

Because the matters and things alleged in plaintiffs' said bill of complaint are not sufficient to entitle them to the relief prayed for or to any relief whatsoever or to be heard or to maintain an action.

J. E. COCHRAN,
J. E FROST, ..
C. F RIDDELL,
EDWIN C EWING.

Indorsed: Motion to Dismiss. Filed June 18, 1914.

No. 37

MEMO DECISION

Peters & Powell,
Earle & Steinert,
For Plaintiff.
Charles F. Riddell,
J. E. Cochran,
J. E Frost,

Edwin C. Ewing,
For Defendants.

NETERER, District Judge:

An order may be presented denying the motion to dismiss. By the allegations of the bill of complaint, actual fraud is charged between the assessing officers. The facts recited in the complaint are not mistakes of fact or errors of judgment on the part of the assessing and equalizing officers, but actual fraud is charged, and confederation and oc-operation with relation to the excessive valuation and assessment of the lands of the complaint. By reason of the allegations and charges made in the bill of complaint, I think justice demands that the bill be answered, and whether relief should be afforded to the complainants will depend upon the evidence which is presented in support of the charges and complaints made.

JEREMIAH NETERER, Judge.

Indorsed: Memorandum Decision Denying Motion to Dismiss. Filed October 26, 1914.

IN EQUITY NO 37

ORDER DENYING DEFENDANTS' MOTION TO DISMISS.

This cause coming on to be heard upon the motion of the defendants Clallam County and Clifford L. Babcock, Treasurer of said County, to dismiss the bill of complaint of the plaintiffs, and the matter having been argued by counsel and submitted to the court, said motion to dismiss is overruled and denied.

To which ruling of this court the defendants except and their exception is allowed.

Done in open court this 30th day of October, 1914.

JEREMIAH NETERER, Judge.

Indorsed: Order Denying Motion to Dismiss. Filed October 30, 1914.

No. 37

STIPULATION

IT IS STIPULATED by and between the plain-

tiffs and the defendants herein, at the instance and request of the plaintiffs in order to save unnecessary expense of useless repetition in making up the record for appeal herein, as follows, to-wit:

That there was served by the plaintiffs upon the defendants and filed herein on the 9th day of December, 1914, an amended Bill of Complaint which was in all respects similar in words and figures to the original complaint, save in the following particulars:

(A In the original bill of complaint, in paragraph VIII thereof, page 4, at line 27 it is alleged by the plaintiffs that the timber upon the lands in the zone in said paragraph referred to amounts, according to the county cruise of Clallam County, to the sum of 1,230,041 ¼ M feet; whereas in the amended bill of complaint this aggregate timber in this zone is alleged, in paragraph VIII, page 4, line 25, to be 700,000 M. feet.

(B) In the amended complaint, in paragraph VIII, page 4, line 22, it is alleged that the County of Clallam for the year 1913, fixed the assessment upon poles at 10 cents each and upon piles at 2 cents each within the zone therein referred to, there being no such allegation in the original bill.

(C) In the original bill of complaint, in paragraph X thereof, page 6, line 4, it was alleged that the timber upon the plaintiffs' lands in the zone therein referred to was shown by the county cruise to amount to 1,230,041 ¼ M. feet; whereas in the amended bill of complaint, in paragraph X thereof, on page 6, line 3, this aggregate of timber is alleged to be 700,000 M. feet.

(D) In the amended bill of complaint there appear paragraphs XXV A and XXV B which do not appear in the original complaint, said paragraphs reading as follows:

XXV A

"That prior to the assessment and levy of the taxes complained of herein these complainants under instruments of conveyance conveying to them all of the lands hereinabove described, were in the actual

possession and occupation of a portion of said lands for the whole; otherwise said lands are vacant and unoccupied."

XXV B

"That it is the duty of the Treasurer of Clallam County under the law of the state, after receiving the moneys so taxed, to pay the sum so received in the proportions designated in his tax books to the various road and bridge funds and to the city of Port Angeles and to the state of Washington and to the various funds for which said taxes are collected and distributed under the law, and to other officers and authorities entitled to receive the same, and if the plaintiffs instituted suit to recover back the taxes so paid to the town of Port Angeles or county, or road, or school districts, they would be obliged to bring suit against each one of the taxing bodies receiving the proportionate share of the tax, thereby necessitating a multiplicity of suits, and the proportion of the tax which should go to the state of Washington could not be collected back by any legal proceeding whatever; and if repayment could be compelled from the town of Port Angeles and other taxing bodies, such repayment would not cover the costs, including commissions deducted for the collection of the tax, and penalties, and complainants would be subject to great and irreparable injury for which there is not a complete, adequate or any remedy at law.

That the Treasurer of Clallam County is required under the law, upon the delinquency of said taxes, to immediately issue delinquent certificates against said lands, under which same are authorized to be sold and would be sold to pay said taxes. The levy and existence of said tax and the threatened issuance of delinquent certificates and sale thereunder constitute a cloud upon plaintiffs' title to said lands and all of them."

IT IS THEREFORE STIPULATED that in preparing the transcript and printing the record, these changes may be pointed out by interlineation, or by any other appropriate and convenient method.

IT IS FURTHER STIPULATED with reference to the pleadings in this cause that after the closing of the evidence and at the time of the argument of this cause, the defendants, over the objection of the plaintiffs, under circumstances set forth in the statement of facts herein, were allowed to amend their answer in certain particulars, as defendants contended, to correspond with the evidence in the case, and thereafter, on to wit the 3d day of Feb., 1916, the defendants served upon the plaintiffs and filed herein their second amended answer with reference to which it is here and now stipulated that said second amended answer is the same in all respects as the amended answer filed on the 18th day of January, 1915, save only in the following particulars, to-wit:

(A) Paragraph IX was amended to read as follows:

"With reference to paragraph IX of said amended bill the defendants admit the practice by assessors and taxing boards of the custom therein referred to, and admit the pursuit of such custom by county assessors and its recognition and acquiescence by the State Board of Equalization; deny that the assessor of Clallam County gives out and pretends that for the year 1913 he assessed taxable property within Clallam County upon the basis of fifty-three per cent of the true and fair value in money; deny that the members of the County Board of Equilization give out and pretend that they equalized and approved the assessments upon the taxable property within said county upon the basis alleged in said paragraph; deny that the interior timber lands in said county, including the lands owned by the plaintiffs were and are valued in the year 1913 for the purpose of taxation at sums in excess of fifty-three per cent of the true and fair value thereof in money; that other properties in said county, real and personal were valued at sums less than fifty-three per cent of the true and fair value thereof in money; deny that the plaintiffs were discriminated against grossly and intentionally, or at

all, by the assessing officers of Clallam County in the matter of the assessment and taxation of their lands for the year 1913."

(B) Paragraph X was amended to read as follows:

"With reference to paragraph X of said amended bill, the defendants admit that the timber upon the lands of the plaintiffs, as shown by the cruise made by the county of Clallam, amounts in the aggregate to approximately 700,000,000 feet, the figures set forth therein, and that the assessments upon said lands for the year 1913 were made upon the basis of said cruise; deny that the timber upon the lands of the plaintiffs was over-valued greatly, or at all, by the assessing officers of said county in the valuations put thereon by them for the purpose of taxation in the year 1913; admit that the valuations placed by the assessing officers of said county upon the lands of the plaintiffs for the purpose of taxation for the year 1913, amount to the figures therein set forth, to wit: $479,990.00; deny that the true and fair value in money of said lands does not exceed the sum of $550,000.00, and did not exceed that sum in the year 1913; deny that said assessment for the year 1913 was made upon the basis of 87 per cent; that no property in said Clallam County, save the timber lands owned by the plaintiffs and certain other timber lands similarly situated, was assessed in said year 1913 at so great a proportion of its true and fair value in money; deny that the assessment upon the lands of the plaintiffs, or upon any other lands or other property in said county, was in pursuance of any combination and conspiracy between the assessor of Clallam County and the other members of the County Board of Equalization of said county, as alleged in said paragraph, or at all.

(C) Paragraph XII was amended to read as follows:

"With reference to paragraph XII of said amended bill, the defendants admit the election of the assessing officers of Clallam County as alleged in said para-

graph; deny that the assessing officers of said county have combined and concerted together, wrongfully and corruptly, with the intents and purposes alleged, or for any other intent and purpose, or at all; deny that it has been the custom of the assessor of said county to consult and advise with the other members of the County Board of Equalization of said county, and with residents of the Middle and West and East Districts of said county in making his assessment rolls, and that such custom was followed in making his assessment rolls for the years 1912 and 1913; deny that such custom is or was in pursuance of a combination and conspiracy as alleged in said paragraph or at all; deny that the assessment roll does not and did not in the years stated represent the judgment of the assessor; deny that said roll was and is the result of any combination and conspiracy with the other members of the County Board of Equalization; deny that the assessment roll is approved as a matter of course as relates to assessments on timber lands or otherwise by the County Board of Equalization; deny that no fair hearing is possible to be had on appeal to said Board; deny that the custom alleged in said paragraph or any other similar or unlawful custom has been followed in said county for several years continuously past, or at all; and deny that the plaintiffs were refused a hearing upon appeal to said Board in 1910, as alleged in said paragraph, or at all, or that the conversation between attorney for the plaintiffs and the members of said Board took place at said time or at all, with reference to the futility of introducing evidence as to the value of timber lands."

(D) Paragraph XVII was amended in the following respect:

Plaintiffs' amended bill had charged among other things as follows:

"That upon the Straits of Fuca and immediately adjoining tidewater there lie fine bodies of fir, spruce, cedar and hemlock timber, which can readily be logged to the Straits at the present time."

This the defendants had admitted in paragraph

XVII of their amended answer, but deny in paragraph XVII of their second amended answer.

And with this explanation IT IS STIPULATED that plaintiffs' amended bill and the defendants' second amended answer need not be set out in this transcript on appeal.

EARL & STEINERT,
PETERS & POWELL,
Attorneys for Plaintiffs.
EDWIN C. EWING,
C. F. RIDDELL,
Attorneys for Defendants.

Indorsed: Stipulation. Filed November 6, 1916.

No. 37

DEFENDANTS' ANSWER TO AMENDED BILL OF COMPLAINT

To the Honorable Judges of the above entitled Court:

Come now Clallam County, a municipal corporation of the State of Washington, and Clifford L. Babcock, Treasurer of said Clallam County, the defendants named in the above entitled action, and for answer to the amended bill of complaint of the plaintiffs herein respectfully submit the following:

I

With reference to paragraph I defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained, but they are willing to admit the same.

II

With reference to paragraph II, these defendants admit the allegations thereof.

III

With reference to paragraph III, these defendants admit that the defendant, Clifford L. Babcock, now is and ever since the 9th day of January, 1911, has been the duly elected, qualified, and acting treasurer of Clallam County, Washington, and a resident and inhabitant of said Clallam County.

IV

With reference to paragraph IV these defendants admit the allegations thereof.

V

With reference to paragraph V these defendants admit the allegations thereof.

VI

With reference to paragraph VI, these defendants admit that the timber lands of said County have been cruised and estimates of the quantities and quality of the different species of timber carefully made and that such estimates were consulted and were a factor in fixing the taxable values of timber lands in said county and these defendants admit that the geographical location, availability, physical characteristics of the ground and other elements influencing the market value of timber and timber lands were carefully considered in making assessments referred to in said paragraph VI; and these defendants deny all the other allegations contained in said paragraph VI.

VII

With reference to paragraph VII these defendants deny the allegations thereof.

VIII

With reference to paragraph VIII these defendants admit that the assessing officers of said county for the year 1913 put upon the timber and the lands of plaintiffs the valuations therein set forth; admit that plaintiffs are the owners of lands and timber lands to the extent and in the amounts of figures therein stated; and deny all the other allegations thereof.

IX

With reference to paragraph IX these defendants deny all the allegations thereof.

X

With reference to paragraph X, these defendants admit that the assessing officers of said county for the year 1913 put upon the timber and lands of the plaintiffs the valuations therein set forth; admit that the plaintiffs are the owners of lands and timber to

the extent and in the amounts and figures therein stated; and deny all the other allegations therein contained, and allege that all of said lands referred to in said paragraph are assessed for taxes at the same proportion of their market values as other similar timber lands of said county.

XI

With reference to paragraph XI, these defendants admit the allegations thereof.

XII

With reference to paragraph XII these defendants deny the allegations thereof.

XIII

With reference to paragraph XIII, these defendants deny the allegations thereof.

XIV

With reference to paragraph XIV, these defendants admit the composition of the County Board of Equalization of Clallam County and the residence of the constituent members thereof as alleged in said paragraph, and deny all the other allegations thereof.

XV

With reference to paragraph XV these defendants deny the allegations thereof.

XVI

With reference to paragraph XVI these defendants deny the allegations thereof.

XVII

With reference to paragraph XVII these defendants admit the valuation of the timber upon the lands of plaintiffs for the year 1913, as therein set forth, and deny all the other allegations thereof.

XVIII

With reference to paragraph XVIII these defendants deny the allegations thereof.

XIX

With reference to paragraph XIX these defendants deny the allegations thereof.

XX

With reference to paragraph XX these defendants admit the provisions of Section 9112 of Remington &

Ballinger's Code therein referred to but allege that the act of the Legislature of which said section is a part was not the law of the State of Washington at the time the assessment referred to in this action was made by the proper officers of said Clallam County; admit the assessment of taxes for the year 1913 at the amount therein set forth and that the officers therein described had and have the knowledge of the plaintiffs' property therein described, as therein alleged; and deny all the other allegations thereof.

XXI

With reference to paragraph XXI, these defendants deny all the allegations thereof and allege that the assessments of said lands and the valuations put thereon are the result of the honest deliberation of the assessing officers of said county, formed after careful investigations and upon full information.

XXII

With reference to paragraph XXII, these defendants deny the allegations thereof.

XXIII

With reference to paragraph XXIII these defendants deny the allegations thereof.

XXIV

With reference to paragraph XXIV, these defendants admit the extension of the taxes and the delivery of the tax rolls to the Treasurer of Clallam County, and that the amount of taxes demanded by Clifford L. Babcock as Treasurer of said Clallam County is in the sum therein stated, and deny the other allegations thereof.

XXV

With reference to paragraph XXV these defendants admit the tender of the amount therein stated and that the said Clifford L. Babcock as Treasurer of said Clallam County has refused to accept said tender as payment in full of the taxes upon the lands of the plaintiffs for the year 1913; and admit the payment by the plaintiffs of the taxes assessed against the lands of the plaintiffs for all years prior to 1913; and deny all the other allegations thereof.

XXVI

With reference to paragraph XXVI these defendants deny the allegations thereof.

XXVII

With reference to paragraph XXVII, these defendants admit the jurisdiction of this court but deny all of the other allegations of said paragraph.

XXVIII

With reference to paragraph XXVIII, these defendants deny the allegations thereof.

Wherefore, having fully answered the bill of complaint herein, defendants pray to be hence dismissed, with their reasonable costs and charges in this behalf most wrongfully sustained, and for such other and further relief as to the court shall seem meet, just and equitable.

CLALLAM COUNTY,
A Municipal Corporation.
C. L. BABCOCK,
As Treasurer of said Clallam County.
By EDWIN C. EWING,
Their Attorney.

J. E. COCHRAN,
J. E. FROST,
E. C. EWING,
C. F. RIDDELL,

Attorneys for Defendants. Postoffice and office address: 627 Colman Building, Seattle, Washington.

Indorsed: Defendants' Answer to Amended Bill of Complaint. Filed November 20, 1914.

No. 37

MOTION TO STRIKE

Come now the plaintiffs and move against the defendants' answer to the Amended Bill of Complaint, as follows:

I

Referring to paragraph VI plaintiffs move to strike the same, for the reason that it contains affirmative matter not responsive to the plaintiffs' bill, and for the

reason that it does not specifically answer or deny the charges of the plaintiffs' bill.

II

Referring to paragraphs VII, VIII, IX, and X, the plaintiffs move to strike the same and each of them, on the ground that they are not sufficiently specific admissions or denials of the plaintiffs' bill and particularly to strike the last three lines of paragraph X, upon the ground that same is an injuction of affirmative matter not called for by the bill or warranted in the answer.

III

Referring to paragraphs XII, XIII, XIV, XVI, XVII, XVIII and XX, plaintiffs move to strike the same because not specifically responsive to plaintiffs' bill, and to require the defendants to set out specifically admissions or denials of the allegations of plaintiffs' bill referred to in said sections.

IV

Referring to paragraphs XXII and XXIII plaintiffs move the court to strike the same and to require defendants to specifically answer the allegations of the plaintiffs' bill, and either to affirm or deny as to the specific charges of the same.

EARLE & STEINERT,
PETERS & POWELL,
Attorneys for Plaintiffs.

Indorsed: Motion to Strike. Filed November 30, 1914.

No. 37

ORDER ALLOWING PLAINTIFFS' MOTION TO MAKE MORE DEFINITE AND CERTAIN

This matter having come on to be heard in the above entitled court upon the motion of the plaintiffs to strike certain paragraphs of the defendants' answer, and to require the same to be made more definite and certain, plaintiffs being present in court by their counsel, Messrs. Peters & Powell, and the defendants being present in court by Mr. Edwin C. Ewing, their counsel.

The motion of plaintiffs was allowed, and defendants allowed ten days to answer.

Done in open Court this 21st day of December, 1914.

JEREMIAH NETERER, Judge.

Indorsed: Order Allowing Plaintiffs' Motion to Make More Definite and Certain. Filed December 21, 1914.

No. 37

AMENDED ANSWER TO AMENDED BILL OF COMPLAINT.

To the Honorable Judges of the above entitled court:

Come now Clallam County, a municipal corporation of the State of Washington, and Clifford L. Babcock, Treasurer of said Clallam County, the defendants named in the above entitled action, and by leave of court first had and obtained file this their amended answer to the amended bill of complaint of the plaintiffs herein:

I

With reference to paragraph I of said amended bill, the defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained, but they are willing to admit the same and not put the plaintiffs to proof thereof.

II

With reference to paragraph II of said amended bill, the defendants admit the allegations thereof.

III

With reference to paragraph III of said amended bill, the defendants admit that the defendant, Clifford L. Babcock, now is, and ever since the 9th day of January, 1911, has been, the duly elected qualified and acting Treasurer of Clallam County, Washington, and a resident and inhabitant of said Clallam County.

IV

With reference to paragraph IV of said amended bill, the defendants admit the allegations thereof.

V

With reference to paragraph V of said amended bill, the defendants admit the allegations thereof.

VI

With reference to paragraph VI of said amended bill, the defendants admit that for the purpose of assessment for taxation, and as a basis therefor, the assessing officers of Clallam County have from time to time within the period of five or six years last past caused timber lands in said county to be cruised and the cruises and estimates thus made to be adopted by the county; that most of the timber lands in the county owned by private parties as distinguished from Government lands have now been cruised, and that all the lands owned by the plaintiffs have been so cruised, and that so far as respects timber lands within the county upon which cruises have thus been made, it is claimed by the assessing officers that the same have been cruised upon the basis of the cruises thus obtained; admit that the assessments made by the assessing officers of the county have been made according to certain zones or districts which the assessing officers have laid off; but deny that said zones or districts have been laid off and determined arbitrarily, unreasonably or unlawfully, or without reference to and in disregard of the true and fair value in money of timber on the lands within such zones or districts, or in any other manner than fairly, truly, impartially, and as a result of the honest and mature deliberation and judgment of the assessing officers of said county formed upon full information after careful inquiry and investigation.

VII

With reference to paragraph VII of said amended bill, the defendants deny that the zone therein referred to was arbitrarily laid off; admit the geographical location of said zone, but deny its dimensions and area as alleged in said paragraph; deny that within this zone are included those timber lands which of all timber lands within the county are of the greatest value; admit that within this zone the timber is valued for the year 1913 by the assessing officers of Clallam County at the figures set forth in said paragraph; admit that in this and all other zones, in addition to the values placed by the assessing officers upon the timber, there

was for the year 1913 placed upon the lands themselves a valuation of $1 per acre; deny that the same, in the case of the plaintiffs' lands or the lands of any other persons, was done arbitrarily, unreasonably and unlawfully and without any reference to the actual value thereof, or in any other manner than fairly, truly, impartially and according to law; and deny that many or any of the lands of the plaintiffs are of no value whatsoever independent of the timber standing or being thereon.

VIII

With reference to paragraph VIII of said amended bill, the defendants deny that the zone therein referred to was arbitrarily, unreasonably and unlawfully laid off by the assessing officers; admit that it lies in the Western part of Clallam County; deny that no part thereof lies nearer to the Straits than approximately four to six miles and that no lands within this zone owned by the plaintiffs lie nearer to the Straits than approximately nine miles and that the great body of the lands owned by the plaintiffs within this zone lie much more distant therefrom; admit the form and extent of said zone as alleged in said paragraph; deny that there are no harbors upon the Pacific Ocean within the counties of Clallam or Jefferson at or through which the timber on the lands of the plaintiffs might or could be brought to maket; admit that within this zone there is a large acreage of land and that upon the timber lands within this zone the assessing officers of Clallam County put for the year 1913, for the purposes of taxation, the valuations therein set forth; admit that the plaintiff is the owner of lands and timber to the extent and in the amounts of the figures therein set forth, and that the value of the lands of the plaintiffs within this zone, as fixed and determined by the assessing officers of Clallam County for the year 1913, for the purposes of taxation is as stated therein; deny that all the lands owned by the plaintiffs within this zone or the other zones or districts set off by said assessing officers are separated from the Straits of Fuca by a range of mountains.

IX

With reference to paragraph IX of said amended bill, the defendants deny the practice by assessors and taxing boards of the custom therein referred to, and deny the pursuit of such custom by county assessors and its recognition and acquiescence by the State Board of Equalization; deny that the assessor of Clallam County gives out and pretends that for the year 1913 he assessed taxable property within Clallam County upon the basis of fifty-three per cent of its true and fair value in money, or upon any other and different basis than that provided by the laws of the State of Washington at the time the assessments for the years 1912 and 1913 were made; deny that the members of the County Board of Equalization give out and pretend that they equalized and approved the assessments upon the taxable property within said county upon the basis alleged in said paragraph, or upon any other or different basis than that provided by the laws of the State of Washington at the time the assessments for the years 1912 and 1913 were made; admit that the interior timber lands in said county, including the lands owned by the plaintiffs were and are valued in the year 1913 for the purpose of taxation at sums in excess of fifty-three per cent of the true and fair value thereof in money; deny that other properties in said county, real and personal, were valued at sums less than fifty-three per cent of the true and fair value thereof in money; deny that the plaintiffs were discriminated against grossly and intentionally, or at all, by the assessing officers of Clallam County in the matter of the assessment and taxation of their lands for the year 1913.

X

With reference to paragraph X of said amended bill, the defendants admit that the timber upon the lands of the plaintiffs, as shown by the cruise made by the county of Clallam, amounts in the aggregate to the figures set forth therein, and that the assessments upon said lands for the year 1913 were made upon the basis of said cruise; deny that the timber upon the lands of the plaintiffs was over-valued greatly, or at all, by

the assessing officers of said county in the valuations put thereon by them for the purposes of taxation in the year 1913; admit that the valuations placed by the assessing officers of said county upon the lands of the plaintiffs for the purpose of taxation for the year 1913 amount to the figures therein set forth; deny that the true and fair value in money of said lands does not exceed the sum of $550,000, and did not exceed that sum in the year 1913; deny that said assessment for the year 1913 was made upon the basis of 87 per cent, or upon any other or different basis than the true and fair value in money of all the property assessed; deny that no property in said Clallam County, save the timber lands owned by the plaintiffs and certain other timber lands similarly situated was assessed in said year 1913 at so great a proportion of its true and fair value in money; deny that the assessment upon the lands of the plaintiffs, or upon any other lands or other property in said county, was in pursuance of any combination and conspiracy between the assessor of Clallam County and the other members of the County Board of Equalization of said county, as alleged in said paragraph, or at all.

XI

With reference to paragraph XI of said amended bill, the defendants admit the allegations thereof.

XII

With reference to paragraph XII of said amended bill, the defendants admit the election of the assessing officers of Clallam County as alleged in said paragraph; deny that the assessing officers of said county have combined and concerted together, wrongfully and corruptly, with the intents and purposes alleged, or for any other intent and purpose, or at all; admit that it has been the custom of the assessor of said county to consult and advise with the other members of the County Board of Equalization of said county, and with residents of the Middle and West and East Districts of said county in making his assessment rolls, and that such custom was followed in making his assessment rolls for the year 1912 and 1913, but deny

that such custom is or was in pursuance of a combination and conspiracy as alleged in said paragraph or at all; deny that the assessment roll does not and did not in the years stated represent the judgment of the assessor, and deny that said roll was and is the result of any combination and conspiracy with the other members of the County Board of Equalization; deny that the assessment roll is approved as a matter of course as relates to assessments on timber lands or otherwise by the County Board of Equalization; deny that no fair hearing is possible to be had on appeal to said Board; deny that the custom alleged in said paragraph or any other similar or unlawful custom has been followed in said county for several years continuously past, or at all; and deny that the plaintiffs were refused a hearing upon appeal to said Board in 1910, as alleged in said paragraph, or at all, or that the conversation between attorney for the plaintiffs and the members of said Board took place at said time or at all, with reference to the futility of introducing evidence as to the value of timber lands.

XIII

With reference to paragraph XIII of said amended bill, the defendants deny that at the times therein stated or at any other times, for the reasons or with the intent and purpose therein alleged, or for any other purpose whatsoever, were gross or any discriminations, practiced by the assessing officers of said Clallam County against the plaintiffs or any other persons, or in favor of any other persons, as alleged in said paragraph, or at all.

XIV

With reference to paragraph XIV of said amended bill, the defendants allege that they are without knowledge or information as to the examination of the assessment rolls of said county by the plaintiffs, and the result thereof, and they therefore deny the allegations of said paragraph with regard thereto; deny that the lands and other properties situated at Port Angeles and subject to taxation are valued upon said assessment rolls as equalized for such years at not to exceed

10 to 20 per cent of their true and fair value in money; admit the composition of the County Board of Equalization of Clallam County and the residence of the constituent members thereof as therein alleged, and that the major portion of the population of said county is at Port Angeles; deny that for the purposes therein alleged or for any other purpose, did the three members of said Board resident at Port Angeles, combine and conspire with the Commissioner from the East District, or any other person, against the plaintiffs and other owners of timber lands in the interior of said county, as therein alleged, or against any other person, or at all.

XV

With reference to paragraph XV of said amended bill, the defendants allege that they are without knowledg or information as to the examination by the plaintiffs of the assessment rolls of Clallam County for the years 1912 and 1913 and of property values within said county, and the results thereof, and they therefore deny the allegations of said paragraph with regard thereto; and deny that the farming lands and other properties situate in the East end and subject to taxation are valued upon said tax rolls as equalized for such years at not to exceed 25% to 30% of their true and fair value in money.

XVI

With reference to paragraph XVI of said amended bill, the defendants allege that they are without knowledge or information as to the examination by the plaintiff of the assessment rolls of Clallam County for the years 1912 and 1913 and of property values within said county, and the results thereof, and they therefore deny the allegations of said paragraph with regard thereto; and deny that the personal property within said county described in said paragraph is valued by the assessing officers of said county for the year 1913 at not to exceed 10% to 15% of its true and fair value in money.

XVII

With reference to paragraph XVII of said amend-

ed bill, the defendants admit the location of the lands of the plaintiffs as therein stated; deny that said lands are wholly destitute of facilities for transportation, and that it is impossible to bring the timber therefrom into market or that it is necessary that facilities be provided for transportation to Gray's Harbor on the South or the Straits of Fuca on the North; admit that Gray's Harbor is far distant and that no railroad extends further North from that direction than Moclips, and that Moclips is sixty miles from the plaintiffs' lands; deny that the lands of the plaintiffs are as distant from the Straits of Fuca as therein stated or that said lands are cut off from the Straits by a range of mountains or that it is impossible to bring the timber from said lands except by transportation across such range of mountains; deny that such transportation is impossible of accomplishment except by the construction of a railroad at great expense, or that such expense is beyond the present means at the command of the plaintiffs or which is prohibitive under the present condition of the lumber market or conditions which have at any time heretofore prevailed, or that the facts alleged in said paragraph have a direct and important bearing upon the present value of the lands of the plaintiffs; admit that upon the Straits of Fuca and immediately adjoining tide water, there lie fine bodies of fir, spruce, cedar and hemlock timber, which can readily be logged to the Straits as stated, and that extensive logging operations now are and for many years have been carried on in that portion of said Clallam County; admit that this Straits timber (so called) is in the zone or district described in paragraph VII of said amended bill, but deny that said zone was arbitrarily, unreasonably and unlawfully laid off by the assessing officers of said county; admit that in the zones described in said paragraphs VII and XVII the valuations put upon the timber are as stated in said paragraph XVII; and deny that the true and fair value in money of the so called Straits timber is at least twice the true and fair value in money of the timber on the lands of the plaintiffs.

XVIII

With reference to paragraph XVIII of said amended bill, the defendants admit the geographical location of Port Angeles as therein stated, and the desires and ambitions of the inhabitants thereof; deny the statements therein imputed to inhabitants of Port Angeles and the Assessor; deny the combination and conspiracy therein alleged or any combination and conspiracy; deny the purposes therein imputed to the assessing officers of said county, and the assurances of influential citizens of Port Angeles therein set forth; deny the ownership of real property in Port Angeles by the majority of the members of the Board of Equalization, and the personal interest and desire for aggrandizement of the members of said Board for the purposes therein imputed or for any other purposes incompatible with their official positions and duties.

XIX

With reference to paragraph XIX of said amended bill, the defendants deny that the assessments therein complained of are unequal, discriminating or unlawful, or that they are the result, direct and immediate or otherwise, of any intent, either corrupt or unlawful, or in any wise incompatible with the official positions and duties of said officers, of the County Assessor and the members of the County Board of Equalization of said Clallam County, to discriminate against the plaintiffs or any other persons, or in favor of any persons, either as stated in said paragraph or otherwise, or to undervalue or overvalue the taxable properties in said county for the purposes therein alleged or for any other purposes whatsoever.

XX

With reference to paragraph XX of said amended bill, the defendants admit the provisions of §9112 of Volume 3 of Remington & Ballinger's Annotated Codes and Statutes of Washington therein referred to; deny that the true and fair value in money of the lands of the plaintiffs therein referred to does not exceed, and did not exceed, when the assessments for 1912 and 1913 were made, the sum therein stated; deny that

under said statute any assessment of lands of the plaintiffs for purposes of taxation at a sum greater than the sum of $275,000 is unjust, illegal and void; admit that the true and fair value in money of the lands owned by the plaintiffs is known to the Assessor of Clallam County and to the members of the said County Board of Equalization, and was so known at the time of the making of said assessment and the approval thereof by said Board; deny that said officers in making and equalizing such assessments disregarded the duty placed upon them by law, and deny that said officers fraudulently and unlawfully caused said lands to be assessed at a sum exceeding by $204,990, 50% of the true and fair value in money of said lands; deny that the assessment of said lands was made and approved by said officers with a fraudulent or corrupt intent, or with any other intent incompatible with their official positions and duties, either as stated in said paragraph or otherwise; admit that the taxes levied for the year 1913 upon the lands of the plaintiffs aggregate the sum therein stated, but deny that had said taxes been levied upon the true and fair value in money of said lands, the same would not have exceeded the sum of $9250.00; deny that the practices of the assessing officers of said county in the matter of the assessment of the lands of the plaintiffs for the year 1913, or any other year, were fraudulent or unlawful, or in any wise incompatible with the duties of said officers, or that there are or were imposed upon the lands of the plaintiffs for the said year $6559 in excess of all taxes which might or could equitably or lawfully be imposed thereon.

XXI

With reference to paragraph XXI of said amended bill, the defendants deny either an over valuation of the lands therein referred to, or the undervaluation of other property in said county and the pursuit and practice of the policy therein imputed to the assessing officers of said county, or any other policy incompatible with their official duties, for several years last past, or at all; deny that the assessment of the lands of the

plaintiffs and other owners of timber lands in the interior of said county are proportionately higher than the assessments imposed upon other real and personal properties in said county, or that said assessments are or result in an actual or any fraud upon the plaintiffs; deny that any plan resulting in fraud upon the plaintiffs or any other persons is arbitrarily and systematically or otherwise, adopted and carried out by the officers therein referred to or by the defendants herein.

XXII

With reference to paragraph XXII of said amended bill, the defendants deny that the assessments upon the lands of the plaintiffs were made by the assessor of said county for the year 1912 at a high, excessive, unlawful and illegal rate as specified in said amended bill, and upon the unlawful and fraudulent basis therein mentioned; admit that thereafter the County Board of Equalization met to consider and review the assessment roll; deny that such review was ostensible, specious and fraudulent in character; deny that the members of said Board had combined and conspired with the Assessor as therein stated, or at all; admit the appearance and protest of the plaintiffs before said Board at its regular sitting in 1912 as therein stated; admit that the protests of the plaintiffs were overruled by the Board, but deny that the same were arbitrarily disregarded or that the petition of the plaintiffs to equalize their assessment was arbitrarily denied.

XXIII

With reference to paragraph XXIII of said amended bill, the defendants deny that the assessments upon the lands of the plaintiffs were made by the assessor of said county for the year 1913 at a high, excessive, unlawful and illegal rate as specified in said amended bill, and upon the unlawful and fraudulent basis therein mentioned; admit that thereafter the County Board of Equalization met to consider and review the assessment roll; deny that such review was ostensible, specious and fraudulent in character; deny that the members of said Board of Equalization had combined and conspired with the assessor as therein

stated, or at all; admit the appearance and protest of the plaintiffs before said Board at its regular sitting in 1913 as therein stated; admit that the protests of the plaintiffs were overruled by the board, but deny that the same were arbitrarily disregarded or that the petition of the plaintiffs to equalize their assessment was arbitrarily denied.

XXIV

With reference to paragraph XXIV of said amended bill, the defendants admit the extension of the taxes and the delivery of the tax rolls to the Treasurer of Clallam County, but deny that the basis of such extension and such assessment was high, excessive, unlawful and fraudulent as alleged therein; admit that said Treasurer has demanded payment of such taxes as shown by said rolls, but deny that said taxes are illegal, fraudulent or arbitrary; admit that the taxes so demanded by said Treasurer amount in the aggregate to said sum of $15,809, and that said Treasurer, unless restrained by order of this court, will sell the property of the plaintiffs to satisfy such taxes.

XXV

With reference to paragraph XXI of said amended bill, the defendants admit the tender of the amount therein stated, and that the said Clifford L. Babcock, as Treasurer of said Clallam County, has refused to accept said tender as payment in full of the taxes upon the lands of the plaintiffs for the year 1913; deny that the sum of money thus tendered is more than the taxes justly due and equitably due from the plaintiffs as therein alleged; deny that the plaintiffs' property was assessed upon any different basis than all the other property within said county or that said assessments were other than legal and equitable, equal to and uniform with the assessments upon all other property within said county; admit that the taxes upon the lands of the plaintiffs for all years prior to 1913 have been paid and discharged; and deny that the taxes for the year 1913 have been paid and discharged by the tender and payment as specified in said paragraph.

XXV-A

With reference to paragraph XXV-A of said amended bill, the defendants admit the allegations thereof.

XXV-B

With reference to paragraph XXV-B of said amended bill, the defendants admit the duties of the Treasurer of Clallam County with regard to the disposition of taxes collected by him, as stated therein; deny that if the plaintiffs instituted suit to recover back taxes paid, as alleged in said paragraph, they would be obliged to bring suit against each one of the taxing bodies therein mentioned, and deny that thereby there would be necessitated a multiplicity of suits, and deny that the proportion of the tax going to the State of Washington could not be collected back, or that repayment from the town of Port Angeles would not cover costs and other items referred to therein, or that plaintiffs would thereby be subjected to great and irreparable injury or that plaintiffs would not have a complete, adequate or any remedy at law; admit the duties of the Treasurer of Clallam County with regard to the issuance of certificates of delinquency as therein alleged; and deny that the levy and existence of the tax therein referred to constitute a cloud upon the title to the lands of the plaintiffs or any of them.

XXVI

With reference to paragraph XXVI of said amended bill, the defendants deny that the assessment of the lands of the plaintiffs for the year 1913 is arbitrary, unjust, illegal or fraudulent as compared with the assessment of all other property in said Clallam County, or otherwise, or that said assessment as made by the assessor and assessing officers of said county is prohibited by the Constitution of the State of Washington, or is in violation of §§ 1 and 2 of Article VII thereof, as therein alleged, or that the taxes upon the plaintiffs' lands are not equal and uniform as compared with all other property in said county.

XXVII

With reference to paragraph XXVII of said

amended bill, the defendants deny that if the levy and assessments of taxes upon the lands of the plaintiffs for the year 1913 be not vacated, set aside and held for naught, the same will result in the taking of the property of the plaintiffs without due process of law or in denying to the plaintiffs the equal protection of the laws, or that the same would be a violation of the Fourteenth Amendment to the Constitution of the United States; but admit the jurisdiction of this Honorable Court.

XXVIII

With reference to paragraph XXVIII of said amended bill, the defendants deny that the plaintiffs are remediless at common law or that they are relevable only in a court of equity as therein alleged.

FIRST AFFIRMATIVE DEFENSE.

And for a first further and affirmative defense to the cause of action set forth in the plaintiffs' amended bill of complaint herein, the defendants allege:—

I

That the true and fair value in money of timber and timbered lands is dependent, among other factors, upon the character and quality or grade of timber, the thickness of the stand of timber or quantity per acre or upon a given tract, the topography of the ground upon which the timber stands, the presence of water for use in camps, logging engines and locomotives, the probability of fires, the size and contiguity of the tracts of land, large or contiguous tracts constituting practically solid bodies of land containing sufficiently large quantities of timber to constitute the same profitable logging enterprises being commercially more valuable per acre or per M feet of timber than smaller or isolated tracts not sufficient in size to warrant the construction of roads, railroads, camps and other facilities necessary to the removal of the timber.

The lands of the plaintiffs, referred to in their amended bill of complaint herein, consist of such large and practically solid bodies, bearing timber of valuable character, of exceptionally high grade and of thick and heavy stand, and constitute desirable, advantageous and

profitable logging enterprises from an operating standpoint, making the same proportionately more valuable than smaller or isolated tracts of timbered lands in the same localities, or otherwise similar in character to the lands of the plaintiffs.

II

That on or about the year 1908, the assessing officers of Clallam County caused to be employed experienced, capable and competent timber cruisers to make, and who did make, full, complete and detailed cruises and estimates of the character, quality and quantity of the timber standing upon the various legal sub divisions of land in said county. All of the timbered lands in said county in private ownership, including the lands of the plaintiffs, have now been so cruised and platted into tracts or zones, and detailed reports and estimates of such cruises made and filed in the office of the County Assessor of said county respecting the same. These reports, estimates and plats, taking into due consideration the factors of value hereinabove set forth, and also the availability, ease or difficulty of logging, and physical characteristics of the lands, together with such other information with reference to agricultural possibilities of the lands, the presence of mineral deposits and other similar factors of value as the assessing officers were able to obtain upon independent investigation, were, and have been consulted and used by such officers to assist in ascertaining and determining the values of said lands for the purposes of assessment and taxation, and such facts, plats, estimates, reports, data and other information, with due attention to geographical location, availability, physical characteristics of the ground, and other elements influencing the value of timber and timbered lands, as hereinabove set forth, were carefully considered by such officers in making the assessments referred to in the plaintiffs' amended bill of complaint herein.

The assessments thus made, as hereinabove and hereinafter referred to, were not arbitrary, capricious, unlawful, unreasonable, inequitable, disproportionate, or the result of any combination or conspiracy whatso-

ever, as alleged in the plaintiffs' amended bill of complaint herein, or at all, but were the result of the honest, sincere, conscientious, mature and deliberate judgment and belief of the assessing officers and equalizing officers of said county formed upon and after full and careful investigation of all the facts and circumstances surrounding said lands and affecting their values, as hereinabove set forth, and a full, free and fair hearing as required by law.

III

That by the laws of the State of Washington in force and effect at the time the assessment for the years 1912 and 1913 complained of in plaintiffs' said amended bill of complaint herein were made, and prior thereto, as hereinafter set forth, it was and is provided:—

(Laws of 1897, Chapter LXXI)

§ 1. That all real and personal property now existing, or that shall be hereafter created or brought into this state shall be subject to assessment and taxation upon equalized valuations thereof, fixed with reference thereto on the first day of March at twelve o'clock meridian, in each and every year in which the same shall be listed, and

§ 2. That real property for the purposes of taxation, shall be construed to be the land itself, and all buildings, structures and improvements, or other fixtures of whatsoever kind thereon, and all rights and privileges thereto belonging or in any wise appertaining, and all quarries and fossils in and under the same, which the law defines, or the courts may interpret, declare and hold to be real property, for the purposes of taxation, and

§ 6. That all real property in this state subject to taxation shall be listed and assessed under the provisions of this act in the year 1900 and biennially thereafter on every even numbered year with reference to its value on the first day of March preceding the assessment, and that all real estate subject to taxation shall be listed by the assessor each year in the detailed and assessment list and in each odd numbered year the valuation of each tract for taxation shall be the same

as the valuation thereof as equalized by the county board of equalization in the preceding year, and

§ 42. That all property shall be assessed at its true and fair value in money; that the assessor shall value each article or description of property by itself, and at such sum or price as he believes the same to be fairly worth in money at the time such assessment is made; that in assessing any tract or lot of real property, the value of the land, exclusive of improvements, shall be determined; in valuing any property on which there is a coal or other mine, or stone or other quarry, the same shall be valued at such price as such property, including the mine or quarry, would sell at a fair voluntary sale for cash.

IV

That the assessment for the year 1913, complained of in the plaintiffs' amended bill of complaint, was the assessed and equalized value of the lands of the plaintiffs for the year 1912, upon which the platintiffs paid all taxes levied and assessed without protest; that the assessments of the lands of the plaintiffs, described in their said amended bill of complaint, based upon the cruises of timbered lands in said county, as herein set forth, began and were made in the year 1910, and were used and consulted and adopted in 1911 and 1912, and have continued ever since; that the plaintiffs, as alleged in their amended bill of complaint herein, paid without protest all of the taxes levied and assessed upon their said lands for the years, 1910, 1911 and 1912.

V

That the methods and bases upon which, and the laws of the State of Washington under which, the assessments of timbered lands in Clallam County, including the lands of the plaintiffs, have been made since the year 1910, have at all times since that date, been known to and acquiesced in by the plaintiffs.

VI

That under the laws of the State of Washington, all taxes for State, County, Municipal and other purposes, are levied in specific sums and charged directly to the respective counties of said State; the rate per

centum necessary to raise the taxes so levied in dollars and cents is computed and ascertained by the County Assessor of each county; that after taxes are thus levied, neither the county nor the property therein can be relieved of the duty of the payment of such taxes; that deficiencies owing to a reduction in the amount of taxes to be paid by any property owner or tax payer, or to a failure to collect taxes for any reason, are by the laws of said State, required to be added to, made up and collected under future assessments and levies, all of which is known to the plaintiffs.

That the lands of the plaintiffs, as admitted by the allegations of their amended bill of complaint herein, are not assessed or taxed at any greater or higher value than other timbered lands in said county of similar character or similarly situated to the lands of the plaintiffs, and upon which the taxes and assessments have been paid by the owners thereof.

That under the laws of the State of Washington, county boards and officials are forbidden and are without authority to remit or grant refunds of taxes paid, all of which is known to the plaintiffs herein; that the plaintiffs neglected and delayed to take proper or any steps, or to bring any suit or other proceeding to correct the alleged inequitable assessments referred to in their said amended bill of complaint herein, until after the larger portion of the taxes levied upon other lands similar in character and similarly located to the lands of the plaintiffs had been paid, and if relief as prayed for in the plaintiffs' said amended bill of complaint is granted, other owners of property similar in character and similarly situated to the lands of the plaintiffs in said county, will have been for the year 1913, and in the future will be, compelled to pay an unjust and unfair proportion of the taxes levied upon property in said county.

VII

That by reason of the premises, and the facts and circumstances hereinabove recited, the plaintiffs have been and are guilty of laches and are precluded and estopped to question or deny the legality, fairness or

correctness of the assessment and levy of taxes upon their said lands for the year 1913, and they cannot, in equity and good conscience, now be heard to complain thereof.

SECOND AFFIRMATIVE DEFENSE

And for a second and further affirmative defense to the cause of action set forth in the plaintiffs' amended bill of complaint herein, the defendants allege:—

I

That they hereby refer to paragraphs I, II, III and IV of their first and further affirmative defense hereinabove set forth, and by such reference adopt the same and make them a part of this second affirmative defense.

II

That Section 9112 of Volume 3 of Remington & Ballinger's Annotated Codes and Statutes of Washington was not, and did not become, the law of the State of Washington, until on and after the 12th day of June, 1913, subsequent to the time when the assessment of the lands of the plaintiffs complained of in said amended bill of complaint was made, and therefore did not govern or apply the said assessment of the lands of the plaintiffs.

WHEREFORE, having fully answered the said amended bill of complaint herein, the defendants pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained and for such other and further relief in the premises as to the Court shall seem meet, just and equitable.

CLALLAM COUNTY,
CLIFFORD L. BABCOCK,
as Treasurer of said County,
Defendants.
By EDWIN C. EWING,
Their Attorney.

J. E. Cochran
J. E. Frost
C. F. Riddell

Edwin C. Ewing
Attorneys for Defendants.
Office and Post Office Address:—
627 Colman Building,
Seattle, Washington.

Indorsed: Amended Answer to Amended Bill of Complaint. Filed January 18, 1915.

No. 37

STIPULATION

It is stipulated between plaintiffs and defendants herein as follows, to wit:

That the amount of money alleged by complainants to have been tendered in this cause and by it deposited with the Clerk of this court in furtherance of its tender, may be paid over by the Clerk to the Treasurer of Clallam County and that such payment shall be received by the County Treasurer and operate as a credit to that extent upon the claim for taxes of the county against the complainants, with respect to the lands involved in this suit and that there shall be no penalty or interest charged or collected by the county or its treasurer against these plaintiffs or these lands, on account of the amount so paid in upon said taxes from and after the date of payment herein contemplated to the County Treasurer, whatever the event of this litigation.

With reference to any commissions to be deducted by the Clerk of this Court on disbursing under this stipulation the moneys so paid, it is agreed that this feature shall follow the direction of the court in the final determination of this cause.

The payment to and receipt by the County Treasurer of this money shall not prejudice the position of plaintiffs or defendants in this litigation, or operate to bar or foreclose the plaintiffs or defendants in their contentions herein, save pro tanto, as a credit to this amount to be given this day as payment on account of the taxes involved; but it shall operate as a waiver of any claim to penalty or interest on the part of the county, from this day forward, upon the amount of taxes covered by this payment.

It is stipulated that an order of court enforcing

this stipulation may be entered, upon application of either party hereto.

Dated this 4th day of November, 1914.

PETERS & POWELL,
EARLE & STEINERT,
Attorneys for Plaintiffs.
J. E. COCHRAN,
J. E. FROST,
CHARLES F. RIDDELL,
EDWIN C. EWING,
Attorneys for Defendants.

Indorsed: Stipulation. Filed November 6, 1914.

No. 37
ORDER

This matter coming on to be heard upon the stipulation of the parties plaintiff and defendants herein filed on the 5th day of November, 1914, with respect to the payment to and acceptance by the Defendants of the moneys paid into this court by Complainants, and the same being submitted to this Court, and being considered to the best interests of all parties that said payment be allowed and said county be permitted to accept same, upon the conditions set forth in the stipulation;

It is hereby ordered that the Clerk of this Court pay out said moneys to the defendant Treasurer of Clallam County in furtherance of said Stipulation; the scope and effect of same and the rights of the parties to be as defined in said stipulation.

Done in open Court this 6th day of Nov., 1914.

JEREMIAH NETERER, Judge.

Indorsed: Order. Filed November 6, 1914.

No. 1878
Office of County Treasurer,
Clallam County, Washington.
Port Angeles, Wash., Nov. 7/14.

Received of Frank L. Crosby, Clerk Fd. Ct. $9,065.00, Nine thousand sixty-five 00/100 dollars, ad-

vance tax for Charles H. Ruddock, et al.

C. L. BABCOCK,
Treasurer of Clallam County.

By D. J. Kelly, Deputy.

Indorsed: Filed November 9, 1914.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES H. RUDDOCK and
TIMOTHY H. McCARTY,

Appellants,

vs.

CLALLAM COUNTY and
CLIFFORD L. BABCOCK, treasurer,

Appellees.

No. 37

ORDER UPON STIPULATION AS TO RECORD OF TESTIMONY ON APPEAL

It appearing from the stipulation of appellants and appellees, by their respective counsel, herein filed, that, in the District court of the United States for the Western District of Washington, Northern Division, there were therein pending, heard and determined four causes, being designated as follows: Clallam Lumber Company, a corporation, plaintiff v. Clallam County, a municipal corporation, and Clifford L. Babcock, treasurer, being Equity cause No. 36, and the cause of Clallam Lumber Company, plaintiff, v. Clallam County and Herbert H. Wood, treasurer, being Equity cause No. 56; and the cause of Charles H. Ruddock and Timothy H. McCarty, plaintiffs, v. Clallam County, a municipal corporation, and Clifford L. Babcock, treasurer, being Equity cause No. 37; and the cause wherein Charles H. Ruddock and Timothy H. McCarty, are plaintiffs and Clallam County, a municipal corporation, and Herbert H. Wood, treasurer, are defendants, being Equity cause No. 57; that said four causes were consolidated for trial and were heard, tried and determined by one and the same judge upon the same testimony, evidence and exhibits, and that there was no other or different evidence in the one case than in the other; and it ap-

pearing that there was but one and the same decision of the trial judge handed down in the four cases, and that the plaintiffs in the above four cases are seeking to appeal from the judgment or decree rendered and entered in each of said cases to this honorable court; and it appearing that the transcript of the testimony and evidence in these cases is quite voluminous, covering some 700 pages of printed matter, and that the trial court's memorandum of opinion is quite lengthy; now, in order to save unnecessary expense upon appeal, it is here

ORDERED that all four of these cases may be presented, heard and determined on appeal, in so far as the evidence, testimony, depositions and exhibits are concerned, upon the record of such to be transcribed, printed and sent up in the case of Clallam Lumber Company, a corporation, plaintiff, against Clallam County, a municipal corporation, and Clifford L. Babcock, treasurer, defendants, being Equity cause No. 36 in the trial court, and that the record of the evidence, testimony, depositions and exhibits and the trial court's memorandum decision, need not be transcribed, printed or served or sent up to the Circuit Court of Appeals in the other three cases, but may be considered as incorporated in the record on appeal in each of said causes from the record in Equity cause No. 36 above named.

Dated at Portland, Oregon, this 12th day of December, 1916.

WM. B. GILBERT,
Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

We hereby consent to the rendering and entry of the above order.

J. E. FROST,
C. F. RIDDELL,
EDWIN C. EWING,
Counsel for Appellees.

EARL & STEINERT,
PETERS & POWELL,
Attorneys for Appellees.

Endorsed. Filed in U. S. District Court, Dec. 13, 1916.

DECREE—NO. 37

The above entitled cause having come on duly and regularly for trial before the undersigned Judge of the United States District Court, the plaintiffs appearing by their attorneys, F. W. Keeney, Esquire, Messrs. Earle & Steinert and Messrs. Peters & Powell, and the defendants appearing by Mr. Sandford C. Rose, Prosecuting Attorney for Clallam County, and by their attorneys, J. E. Frost, Edwin C. Ewing and C. F. Riddell, and there being at issue and ready for trial three other causes now on file in this court, involving substantially the same issues and requiring substantially the same testimony, and counsel for all parties hereto, with the consent of the court, having stipulated that all the testimony introduced insofar as applicable should be considered upon the one trial as having been introduced in each of said causes, the said causes being this cause and cause number 57 in this court, between the same parties, and causes numbered 36 and 56 in this court in which Clallam Lumber Company, a corporation, is plaintiff, and Clallam County and its Treasurer in his official capacity as such officer, are defendants; and all parties having introduced testimony and rested, and respective counsel having orally argued this cause to the court, and having submitted their briefs to the court, and the court having considered the same; and it appearing to the court that by written stipulation between the parties filed in this court on the 6th day of November, 1914, and order then entered, there was on said 6th day of November, 1914, paid by the clerk of this court to the defendant Clallam County, the sum of $9,065., the same being the proceeds of the tender theretofore paid into this court by these plaintiffs, and the court, after full consideration of all the facts and the law, being now duly and fully advised in these premises,

It is hereby ORDERED, ADJUDGED AND DECREED that the above entitled cause be and the same

hereby is dismissed with prejudice, and that plaintiffs take nothing by this cause.

It is further ORDERED, ADJUDGED AND DECREED that all the taxes levied for the year 1913 upon the real property described in the complaint herein, are in all things legal and valid and (except for the payment hereinafter in this decree mentioned) are due and owing to Clallam County, a municipal corporation of the State of Washington.

It is further ORDERED, ADJUDGED AND DECREED that the payment of said sum of $9,065. do operate as a payment pro tanto of the taxes for the year 1913 due upon the real property described in the complaint herein, and that the tax for said year 1913 so due upon each description of property appearing upon the tax rolls and set forth in said complaint, be determined by the County Treasurer of said Clallam County in the following manner, to-wit: That said Treasurer determine the total amount of tax due for the year 1913 upon all of said real property described in the complaint herein; that he credit on the said taxes due upon each such description on the tax rolls a sum which bears the same ratio to the total amount due on such description of real property as $9,065. bears to the total amount of tax due upon all of said property for the year 1913; that the amount left after making said deduction be considered and hereby is decreed to be the principal amount of such taxes still due upon such description; that the said Treasurer figure interest according to law relating to delinquent taxes, upon the total amount due on each said description on the tax rolls up to the 6th day of November, 1914, and that he figure interest according to law relating to delinquent taxes, upon the balance due after allowing the credit aforesaid from the 6th day of November, 1914, until paid; and the said balance due, together with the interest figures as aforesaid, and all other lawful costs and charges accruing, shall be the amount necessary to be paid to redeem the said property from the lien of the said taxes.

It is further hereby ORDERED, ADJUDGED

AND DECREED that the above named defendant Clallam County, a municipal corporation of the State of Washington, do have and recover of and against the above named plaintiffs, Charles H. Ruddock and Timothy H. McCarthy, and each of them, a joint and several judgment for its taxable costs and disbursements herein, which are hereby taxed in the sum of Twenty-three Dollars and Ninety Cents ($23.90), for which said sum let execution issue.

To the dismissal of this cause, and to each separate paragraph of this decree and to the signing and entry of this decree, the above named plaintiffs except and their exception is hereby allowed by the court.

Done in open court this 3d day of Feb., A. D. 1916.

EDWARD E. CUSHMAN,
District Judge.

Indorsed: Decree. Filed February 3, 1916.

No. 37

EXCEPTIONS TO AMENDED ANSWER OF DEFENDANTS

The defendants upon the conclusion of the evidence in this cause on the 10th day of December, 1915, obtained permission from the court to amend their answer herein so as to conform to the proofs, which permission was then granted over the objection of the plaintiffs, to which the plaintiffs excepted and said exception was then allowed.

The application of the defendants now made to file herein a formal second amended answer embodying these proposed amendments, is now allowed over the objection of the complainants to which exception is reserved by the complainants and said exception is here and now allowed.

Referring to paragraph IX of said amended pleading complainants except to the amendment which now reads:

"* * * Defendants admit the practice by assessors and taxing boards of the custom therein referred to, and admit the pursuit of such custom by

county assessors and its recognition and acquiescence by the State Board of Equalization."
whereas in their former answer, they had specifically denied these matters.

And referring to line II of said paragraph IX, the defendants now omit the following allegation, which appeared in the former answer:

"Or upon any other or different basis than that provided by the laws of the State of Washington at the time the assessments for the years 1912 and 1913 were made."

And referring to line 15 of said paragraph IX the defendants' amended answer now reads:

"* * * deny that the interior timber lands in said county, including the lands owned by the plaintiffs, were and are valued in the year 1913 for the purpose of taxation at sums in excess of fifty-three per cent of the true and fair value thereof in money."
whereas they previously admitted such matter. And immediately prior to such admission was the following allegation:

"Or upon any other or different basis than that provided by the laws of the State of Washington at the time the assessments for the years 1912 and 1913 were made."
which last allegation is now omitted from the amended answer.

II

Referring to paragraph X of said amended answer, complainants except to the amendment which now reads:

"Deny that said assessment for the year 1913 was made upon the basis of 87 per cent."
omitting from this amendment, what they had formerly pleaded, as follows:

"Or upon any other or different basis than the true and fair value in money of the property assessed."

III

And referring to paragraph XII of said amended answer, complainants except to the amendment which now reads, at line 3, page 7:

"Deny that it has been the custom of the assessor of said county to consult and advise with the other members of the County Board of Equalization of said County, etc."
whereas in their former pleading, they admitted such allegation.

IV

And referring to paragraph XVII of said amended answer, at page 10, line 16 thereof, the defendants now allege:

"But deny that the same can readily be logged to the Straits as stated."
whereas in their former pleading they admitted this allegation.

Complainants' objection is based upon the ground that such amendments are not consistent with the proofs, and are wholly inconsistent with the pleadings upon which the case was tried, and with the position taken by the defendants throughout the trial.

Complainants' exceptions to each of the amendments to the answer in each of the above particulars, are hereby allowed, such exceptions to be entered as of date February 3, 1916.

EDWARD E. CUSHMAN, Judge.

Indorsed: Exceptions to Second Amended Answer of Defts. Filed February 24, 1916.

No. 37

PETITION TO REHEAR AND TO MODIFY JUDGMENT

Come now the plaintiffs, Charles H. Ruddock and Timothy McCarthy, and respectfully pray this court to grant a rehearing herein, in this:

I

The court erred in sustaining the assessment by Clallam County of the hemlock timber and hemlock ties of the plaintiffs in any sum whatsoever, for the reason that it appeared from the evidence in the entire record that this timber and these ties were of no appreciable market value at the dates of the assessment, nor at any time covered by the facts of this

case. The court therefore should have struck such assessment of the plaintiff out, whether the plaintiff had made a case of fraud upon the entire issue or not, since a court of equity having acquired jurisdiction, on the grounds of fraud, would retain it to do equity to the plaintiff, even if the plaintiff failed in sustaining charges of fraud.

Simkins A Federal Equity Suit, p. 27.
Griswold vs. Hilton, 87 Fed. 257.
Waite vs. O'Neill, 34 L. R. A. 550, 76 Fed. 408.
Shainwald vs. Lewis, 69 Fed. 492.

II

The plaintiffs respectfully pray the court to modify the judgment and decree by charging the plaintiffs or the plaintiffs' lands with interest at six per cent per annum from the date of delinquency of taxes, instead of the statutory rate, in view of the plaintiffs' good faith in bringing this suit and in the prosecution of the same, and on the ground of its being an unnecessary hardship to penalize the plaintiff with so high a rate of interest under the circumstances.

Respectfully submitted,
PETERS & POWELL,
EARLE & STEINERT,
Attorneys for Plaintiffs.

United States of America,
State of Washington, ss.
County of King.

Dan Earle being first duly sworn, on oath says: That he is one of the attorneys for the plaintiffs in the above entitled cause and makes this verification on their behalf for the reason that said plaintiffs are without the Western District of Washington; that he has read the foregoing Petition for Rehearing and to Modify Judgment, knows the contents thereof and believes the same to be true.

DAN EARLE.

Subscribed and sworn to before me this 3rd day of March, 1916.

(Seal) ROBERT W. REID,
Notary Public in and for the State of Washington, residing at Seattle.

Indorsed: Petition to Rehear and to Modify Judgment. Filed March 3, 1916.

No. 37

HEARING—JOURNAL ENTRY

Now on this day this cause comes on for hearing on motion for rehearing or review, the Plaintiff being represented by Peters & Powell and D. Earle, and the Defendants represented by C. F. Riddell, and the Court after hearing argument of respective counsel takes the said matter under advisement.

Dated April 18, 1916.

Equity Journal 1—Page 125.

No. 37

MEMORANDUM DECISION ON PETITION FOR A RE-HEARING

FILED MAY 11, 1916.

Peters & Powell,
Earle & Steinert,
Jones & Riddell, For Defendants.
J. E. Frost,
E. C. Ewing, For Plaintiffs.

CUSHMAN, District Judge.

Insofar as the petition for a re-hearing is aimed at the assessment as affected by the hemlock valuation, all that can be said is that certain phases of the evidence—particularly that of some of defendants' witnesses—are more favorable to plaintiffs as to the overvaluation of the hemlock than that covering the valuation of the fir, spruce and cedar; but, after all is said, it is only a question of overvaluation and, in any event, it is not so palpably excessive as to warrant a finding of fraud.

The cases relied upon by the plaintiffs are not cases of overvaluation, but uniformly involve some other controlling element as: fraud; the adoption of a fundamentally wrong principle; an erroneous system; mistake of law or such palpably excessive overvaluation as to impute fraud.

As to the question of interest on the unpaid and untendered taxes, the laws of Washington provide:

"Hereafter no action or proceeding shall be commenced or instituted in any court of this state to enjoin * * * the collection of any taxes * * *, unless the person or corporation desiring to commence or institute such action or proceeding shall first pay, or cause to be paid, or shall tender to the officer entitled under the law to receive the same, all taxes, penalties, interest, and costs justly due and unpaid from such person or corporation on the property * * *". (Sec. 955 Rem. & Bal. Code.)

"The county treasurer shall be the receiver and collector of all taxes extended upon the tax-books of the county, whether levied for state, county, school, bridge, road, municipal or other purposes, and also of all fines, forfeitures or penalties received by any person or officer for the use of his county. All taxes upon real property made payable by the provisions of this act shall be due and payable to the treasurer as aforesaid on or before the thirty-first day of May in each year, after which date they shall become delinquent, and interest at the rate of fifteen per cent per annum shall be charged upon such unpaid taxes from the date of delinquency until paid." (Sec. 9219 Rem & Bal. Code.)

It may be conceded that this suit was brought in entire good faith; that plaintiffs' only remedy was in equity and not at law and that the fifteen per cent. interest charged upon the taxes is a penalty, yet I find no warrant therein given the court to set aside a statute passed to safeguard the sources of the state's revenues.

Re-hearing denied.

Indorsed: Memorandum Decision on Petition for a Rehearing. Filed May 11, 1916.

No. 37
ORDER DENYING PETITION FOR REHEARING

A petition for rehearing having been filed by the plaintiffs in the above entitled cause, briefs having been submitted thereon, and the court having considered

the same; and the court having on the 11th day of May, 1916, filed its memorandum decision herein on said petition for rehearing;

Now, therefore, it is hereby ordered that said petition for rehearing be and the same hereby is denied. To the denial of said petition and to the entry of this order plaintiffs except and exception is hereby allowed.

Done in open Court this 15th day of May, 1916.

EDWARD E. CUSHMAN,
United States District Judge.

Indorsed: Order Denying Petition for Rehearing. Filed May 15, 1916.

Tuesday, May 2, 1916.

Court met pursuant to adjournment. Present: Hon. Jeremiah Neterer, Judge; F. L. Crosby, Clerk; Albert Moody, Assistant U. S. Attorney; Crier Kelly, Bailiff; Yeaton; W. E. Theodore, Deputy U. S. Marshall.

Whereupon court stands adjourned sine die.

JEREMIAH NETERER, District Judge.

No. 37

ASSIGNMENTS OF ERROR ON APPEAL

Now on this 27th day of October, 1916, came the plaintiffs Charles H. Ruddock and Timothy H. McCarthy, by its solicitors, Earle & Steinert and Peters & Powell, and say that the Decree entered in the above entitled cause on the 3rd day of February, 1916, is erroneous and unjust to the plaintiffs, for the following reasons:

I

Because the court overruled the objection of the plaintiffs to the following question asked by the defendants' counsel on cross examination of the witness, Thomas Aldwell, a witness for the plaintiff on the value of the Olympic Power Company's plant:

"Do you know what the general impression in Port Angeles and other places was concerning your dam at that time?"

To this plaintiff objected. The objection was overruled and the witness answered (Plaintiff reserving and being allowed an exception):

"I think around Port Angeles they were very optimistic."

"Q (By defendants' counsel) In other words the general impression was that your dam and power site was a failure up there?"

To this plaintiffs objected as being incompetent, irrelevant and immaterial. The objection was overruled, an exception taken and allowed by the court.

To which question the witness answered substantially that the general impression was that the dam would not hold.

II

Because the court overruled the objection of the plaintiffs to the following question asked by the defendants' counsel on cross examination of the witness Aldwell, a witness for the plaintiffs as to the value of town lots in Port Angeles in March of 1913 and 1914:

The witness was asked whether he was not willing to sell some fifty or sixty thousand dollars worth of Port Angeles property that he had, for double its assessed value, to which the plaintiffs objected as incompetent. The objection was overruled and an exception allowed. The witness answered that he would sell the propetry at double its assessed value.

This holding of the court was error.

III

Because the court erred in admitting the testimony of the defendants' witness, C. M. Lauridsen under the following circumstances:

The witness Lauridsen was called by the defendants as an expert upon the value of real estate in Port Angeles and was asked to point out upon a memorandum or tabulation of certain lots what ones he said he would sell on the first of March, 1914, for their assessed value. This was objected to by plaintiffs on the ground that it was incompetent, irrelevant and not evidence of the market value of the property. This objection was overruled by the court, an exception taken

by plaintiffs and allowed by the court.

The witness answered that the property described was upon the last two sheets of this memorandum or tabulation of lots, being Defendants' Exhibit 29.

II

Because the court overruled the objection of the plaintiffs to the following question put by defendants' counsel to their own witness, C. M. Lauridsen, who was being examined as an expert upon the value of real property in the town of Port Angeles:

"Q. That property, according to Mr. Ware's testimony was worth $6000. on the first of March, 1914. Will you state what you paid for it?"

A I paid $2500 on the 13th of March of that same year."

To which ruling the plaintiffs execpted and their exception was allowed by the court.

III

Because the court overruled the objection of the plaintiffs to the following question put by the defendants to their witness, C. M. Lauridsen:

"Q State the facts about the purchase of Lots 18 in Block 54 and Lots 7 and 14 in Block 172."

To which the witness answered:

"Lot 18 in Block 54 I bought in January for $300." Lot 7 and lot 14 in Block 172, the witness says he purchased for $175.

To which ruling the plaintiffs excepted and their exception was allowed by the court.

IV

Because the court erred in sustaining the objection of the defendants to the following question put by the plaintiff to one of the defendants, Clifford L. Babcock:

"Q Again in section 18 of your answer you say 'Deny that the lands and other properties situated at Port Angeles and subject to taxation and valuation upon the assessment rolls as equalized for such years, were valued at not to exceed 10 to 20 per cent of their true and fair value in money.' Could you state then what you had in mind at that time as the rate at which they were assessed?"

To which ruling the plaintiffs excepted and their exception was allowed by the court.

V.

Because the court, after the conclusion of all the evidence, permitted the defendants to amend their amended answer in the following particulars, to wit:

(a) In paragraph IX of their first amended answer the defendants had denied the existence of the practice amongst assessors of the various counties and particularly Clallam County, of assessing property at from 35 to 50 per cent of its true value, and had denied the recognition of such custom or practice by the State Board of Equalization.

In said second amended answer they "admit the practice by assessors and taxing boards of the custom therein referred to and admit the pursuit of such custom by county assessors and its recognition and acquiescence by the state Board of Equalization" meaning thereby the custom of county assessors of assessing property at from 35 to 50 per cent of its true value.

(b) In their former answer paragraph IX thereof, they had "denied that the Assessor of Clallam County gives out and pretends that for the year 1913 he assessed taxable property within Clallam County upon the basis of 53 per cent of its true and fair value in money, or *upon any other or different basis than that provided by the laws of the state of Washington at the time the assessment of the years 1912 and 1913 were made.*" In their second amended answer, paragraph IX thereof, they omit all of that portion above in italics.

(c) In their first amended answer, paragraph IX, the defendants had plead as follows:

"Admit that the interior timber lands in said county, including the lands owned by the plaintiffs, were and are valued in the year 1913 for purposes of taxation, at sums in excess of 53 per cent of the true and fair value thereof in money."

In their second amended answer, paragraph XIII, they deny this allegation.

To this amendment plaintiffs objected at the time,

but said objection was overruled and an exception allowed by the court.

VI

Because the court allowed the defendants, over the objection of the plaintiffs then made at the conclusion of the evidence, to amend their answer in the following particulars:

(a) In their first amended answer defendants had alleged in paragraph X thereof the following: "Deny that said assessment for the year 1913 was made upon the basis of 102 per cent, or *upon any other or different basis than the true and fair value in money of all property assessed.*"

Whereas the second amended answer contains the same denial, omitting however the words above in italics.

Plaintiffs reserved an exception to this amendment at the time, which was allowed by the court.

(b) In their first amended answer, in paragraph XVII thereof the defendants had alleged: "That in the zones abutting upon the Straits of Fuca there lie fine bodies of fir, spruce, cedar, and hemlock timber which can readily be logged to the Straits as stated," while in their second amended answer they *deny* that said timber can readily be logged to the Straits as stated.

To this amendment and to the allowance thereof the plaintiffs at the time reserved an exception, which was allowed by the court.

VII

Because the court erred in decreeing that the taxes for the year 1914 upon the real property of the plaintiffs described in the complaint, being to wit in the sum of $15,809. (or in any sum in excess of $9250) were legal and valid.

VIII

The court erred in adjudging and decreeing the bill of the plaintiffs dismissed and a judgment against plaintiffs for costs.

IX

Because the court erred in failing to adjudge and

decree that the just and equitable amount to be taxed to the plaintiffs' lands set forth in their bill, was not in excess of $9250.00, and that plaintiffs had tendered this amount, and that the County of Clallam and the Treasurer thereof should be required to accept this amount in full payment for the taxes upon the property described in the bill of complaint, levied for the year 1913 and that the balance of the taxes levied upon said lands should be cancelled and the defendants enjoined from selling said lands for said taxes.

X

Because the court erred in its decree in failing to find and decree that the taxes assessed and levied for the year 1913 against the lands of the plaintiffs, in the sum of $15809. were grossly in excess of the true and just assessment against said lands for said year, and was the result of fraud and conspiracy on the part of the assessor and board of equalization of Clallam County.

XI

Because the court erred in refusing to re-adjust and fix said assessment at a fair and just amount and permit the plaintiffs to pay said amount with the credit of $9250. tendered by the plaintiffs, and to cancel from said lands the balance of said taxes.

XII

Because the court erred, under the evidence, in failing to eliminate the assessments on hemlock timber, ties and poles, and in failing to cut down the amount of the tax levy, as provided in the decree by at least the sum of $1007.41.

XIII

Because the evidence showed that the allegations of the amended complaint were true and that the allegations of the second amended answer were not true.

XIV

Because the court erred in entering judgment that the plaintiffs take nothing by this action and that the defendants go hence without day and recover their costs.

XV

Because the court erred in not entering judgment for the plaintiffs and against the defendants in accordance with the prayer of the amended complaint.

XVI

Because the evidence showed that the plaintiffs' lands set out in the bill of complaint, were assessed by Clallam County for the year 1913 taxes, in the sum of $15809, whereas a just and fair assessment of such lands did not exceed the sum of $9250. and that this over-assessment was the result of fraudulent conspiracy and discrimination on the part of the assessing and taxing authorities of Clallam County as against the plaintiffs and other timber lands, and in favor of all other classes of property in said Clallam County and that said fraudulent conspiracy had been carried on and persisted in by said officers for a number of years prior to the time of such assessment.

WHEREFORE plaintiffs pray that such judgment be reversed and that this Honorable Court will direct the entry of a judgment or decree in accordance with the prayer of plaintiffs' complaint.

EARL & STEINERT,
PETERS & POWELL,
Attorneys for Plaintiffs.

Indorsed: Assignments of Error on Appeal. Filed October 27, 1916.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

IN EQUITY—No. 37

CHARLES H. RUDDOCK and
TIMOTHY H. McCARTHY,
Plaintiffs,

vs.

CLALLAM COUNTY, a municipal corporation, and CLIFFORD L. BABCOCK, Treasurer,
Defendants.

PETITION FOR APPEAL

Filed Oct. 27, 1916, in the District Court of the United States for the Western District of Washington.

TO THE HONORABLE EDWARD E. CUSHMAN, DISTRICT JUDGE:

The above named plaintiffs, feeling themselves aggrieved by the decree made and entered in this cause, on the 3rd day of February, 1916, and, after motion for re-hearing, upon the 16th day of May, 1916, do hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignments of Errors, which is filed herewith, and pray that their appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, and your petitioners further pray that the proper order touching the security to be required of them to perfect their appeal may be made.

EARL & STEINERT,
PETERS & POWELL,
Solicitors.

The petition granted and the appeal allowed upon giving bond conditioned as required by law in the sum of Five hundred Dollars.

E. E. CUSHMAN, Judge.

Dated at Seattle, Oct. 27, 1916.

Indorsed: Petition for Appeal. Filed October 27, 1916.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

CHARLES H. RUDDOCK and
TIMOTHY H. McCARTHY,
Plaintiffs,

CLALLAM COUNTY, a municipal corporation, and CLIFFORD L. BABCOCK, Treasurer,
Defendants.

IN EQUITY—No. 37

BOND ON APPEAL

KNOW ALL MEN BY THESE PRESENTS:

That we, Charles H. Ruddock and Timothy H. McCarthy, as principals, and Massachusetts Bonding and Insurance Company, as surety, acknowledge ourselves to be jointly indebted to the county of Clallam and Clifford L. Babcock, Treasurer, appellees, in the above entitled cause, in the sum of Five hunderd ($500.00) Dollars, conditioned that,

Whereas, on the 3rd day of February, 1916, and after petition for re-hearing thereon, on the 16th day of May, 1916, in the District court of the United States for the Western district of Washington, in a suit depending in that court, wherein Charles H. Ruddock and Timothy H. McCarthy were plaintiffs and Clallam county and Clifford L. Babcock were defendants, numbered on the Equity docket as thirty-seven, a decree was rendered against the said Charles H. Ruddock and Timothy H. McCarthy, and the said Charles H. Ruddock and Timothy H. McCarthy, having obtained an appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit, and filed a copy thereof in the office of the clerk of court, to reverse the said decree, and citation directed to the said county of Clallam, and to the said Clifford L. Babcock, treasurer, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the city of San Francisco, in the State of California, on the 26th day of November, 1916, next.

Now, if the said Charles H. Ruddock and Timothy H. McCarthy shall prosecute their appeal to effect and shall answer all costs, if they fail to make their appeal good, then the obligation to be void, else to remain in full force and virtue.

CHARLES H. RUDDOCK,
By W. A. Peters, his Attorney.
TIMOTHY H. McCARTHY,
By W. A. Peters, his Attorney.

(Seal) MASSACHUSETTS BONDING AND INSURANCE COMPANY,
By Fredk. B. Potwin, Its Attorney in Fact.
Surety.

Approved Oct. 27, 1916.
EDWARD E. CUSHMAN, Judge.

Indorsed: Bond on Appeal. Filed October 27, 1916.

No. 37
ORDER AS TO EXHIBITS

It appearing, in the opinion of the judge presiding in the United States District Court for the Western District of Washington, Northern Division, necessary and proper that the original exhibits offered and received in evidence or filed in said cause on trial thereof, should be inspected in the above entitled court upon appeal,

IT IS ORDERED that said original exhibits be retained for safe keeping by the clerk of said District Court, to be by him transmitted under his hand and seal of said District Court to the clerk of the above entitled court at San Francisco, California, as a supplemental record herein upon appeal.

Dated Seattle, Washington, October 27, 1916.
EDWARD E. CUSHMAN,
Judge of the United States District Court, Western District of Washington, sitting in the Northern Division.

Indorsed: Order as to Exhibits. Filed October 27, 1916.

No. 37
ORDER EXTENDING TIME TO DOCKET CAUSE ON APPEAL

Now on this 2d day of November, 1916, the above entitled cause came on to be heard upon the motion of plaintiffs and appellants for an order extending the time in which to docket this case and to file the record thereof with the Clerk of the Circuit Court of Appeals for the Ninth Circuit, upon the ground that the same is necessary by reason of the great bulk of the record to

be transcribed or printed herein, and the court upon hearing said motion and being fully advised in the premises, and considering that good cause has been shown for granting the same, and being the Judge who signed the Citation on appeal herein;

IT IS ORDERED That the time within which said appellants shall docket said cause on appeal and the return day named in the Citation issued by this court, be enlarged to and including the 1st day of January, 1917.

EDWARD E. CUSHMAN, Judge.

Service of the foregoing Order and receipt of a copy thereof admitted this 2d day of November, 1916.

S. C. ROSE,
C. F. RIDDELL,
Attorneys for Defendants, Appellees.

Indorsed: Order Extending Time to Docket Cause on Appeal. Filed November 2, 1916.

No. 37

PRAECIPE

TO THE CLERK OF THE ABOVE ENTITLED COURT:

You will please prepare a record on appeal in the above entitled cause, consisting of the following:

(1) Caption exhibiting the proper style of court and title of the case; names of the parties; the several dates when the respective pleadings were filed; the time when the trial was had; the name of the judge hearing same; dates of entry of the decree; of plaintiffs' petition for rehearing; of argument on petition to rehear and of the court's taking same under advisement; of the entry of final order denying petition to rehear; of filing petition for appeal; of allowance of petition by the court and the filing of assignment of errors.

(2) Plaintiffs' complaint, filed May 29, 1914.

(3) Defendants' motion to dismiss plaintiffs' bill of complaint, filed June 18, 1914.

(4) Memo decision denying motion to dismiss, filed October 26, 1914.

(5) Order denying motion to dismiss filed Oct. 30, 1914.

(6) Stipulation of parties with reference to payment of tender and acceptance of same, filed Nov. 6, 1914.

(7) Order upon Clerk to pay amount tendered to County Treasurer, filed November 6, 1914.

(8) Receipt of County Treasurer filed Nov. 8, 1914.

(9) Stipulation of parties with reference to Complaint and Amended Complaint, Amended Answer and Second Amended Answer, filed October ...., 1916.

(10) Defendants' amended answer to amended complaint filed January 18, 1915.

(11) Statement of testimony as approved by the court and filed in said cause.

(12) The following depositions taken and filed in this cause on the ..... day of ..... 1915 to wit: Testimony of R. W. Schumacher and J. P. Christenson. Testimony of J. A. Adams.

The following portions of the testimony of William Garlick: Page 27, lines 6 to 22 inclusive; page 50, line 25 to line 2 on page 51; page 52 lines 3 to 18 inclusive; page 57 lines 21 to 30 inclusive; all cross examination, re-direct examination and re-cross examination of the witness Garlick.

Testimony of Charles F. Seal, page 66 lines 6 to 13 both inclusive.

(13) The following exhibits in the case:

Plaintiff's Exhibit P being a letter from Christensen to Grasty dated April 29, 1914.

Plaintiffs' Exhibit L, being letter of J. C. Hansen to Grasty.

Plaintiffs' Exhibit M, letter of Clifford L. Babcock to Grasty.

Plaintiffs' Exhibit N, letter from Lewis Levy to Grasty.

Plaintiffs' Exhibit F, letter from Thomas Aldwell to Grasty dated April 29, 1914.

Plaintiffs' Exhibit E, photographed list of appraisal of properties by Thomas Aldwell.

Plaintiffs' Exhibit FF, Statement showing assessment of shingle mills in Clallam County.

Plaintiffs' Exhibit T. Assessment of Olympic Power Company's property.

Plaintiffs' Exhibit CC, Written statement from Henry to Grasty.

(14) Statement as to assessment of banks, filed December 11, 1915, filed in Cause No. 36.

(15) Memo decision filed January 22, 1916.

(16) Decree rendered and entered February 3, 1916.

(17) Plaintiffs' exceptions to allowance of amendment of defendants' answer and order allowing amendments, filed February 3, 1916.

(18) Plaintiffs' petition to rehear and modify judgment, filed March 3, 1916.

(19) Journal entry showing hearing on petition to rehear entered April 18, 1916.

(20) Memo decision upon petition to rehear filed May 11, 1916.

(21) Order denying petition to rehear filed May 15, 1916.

(22) Plaintiffs' notice to defendants of the lodgment of statement of facts, filed September 1, 1916.

(23) Plaintiffs' assignment of errors, filed October 27, 1916.

(24) Plaintiffs' petition for appeal and order allowing same.

(24½) Bond on appeal and approval thereof.

(25) Citation on appeal and admission of service thereof by the defendants.

(26) Order of court to send up original exhibits.

(All the above, 24, 25 and 26, filed Oct. 27, 1916.)

(27) Journal entry showing adjournment of term of District Court immediately preceding the term commencing the first Tuesday in May, 1916.

(28) Order of court upon stipulation of the parties with respect to settlement of the Statement of Facts, filed October 27, 1916.

(29) This Praecipe with acknowledgment of service thereon by defendants.

(30) Index to all of the above.

Dated at Seattle, Washington, this 30th day of October, 1916.

EARLE & STEINERT,
PETERS & POWELL,
Attorneys for Plaintiffs, Appellants.

Copy of the foregoing Praecipe received this 31st day of Oct., 1916.

SANFORD C. ROSE.
DEVILLO LEWIS.
J. E. FROST.
E. C. EWING.
JONES & RIDDELL,
Attorneys for Defendants, Appellees.

Indorsed: Praecipe for Transcript on Appeal. Filed October 31, 1916.

No. 37

DEFENDANTS' PRAECIPE FOR ADDITIONAL RECORD

TO THE CLERK OF THE ABOVE ENTITLED COURT:

You will please prepare the following additional portions of the record in the above entitled cause, and incorporate the same into the transcript of the record on appeal in the above entitled cause, to wit:

1. Defendants' answer to the amended bill of complaint filed in this court on the 20th day of November, 1914.

2. Plaintiffs' motion against the said answer, said motion being entitled "Motion to Strike" and filed in this court on the 30th day of November, 1914.

3. Order allowing plaintiffs' motion to make more definite and certain, which was dated the 21st day of December, 1914.

SANFORD C. ROSE,
Prosecuting Attorney.
DEVILLO LEWIS,
Deputy Prosecuting Attorney.
J. E. FROST.
E. C. EWING.

JONES & RIDDELL,
Attorneys for Defendants.

Indorsed: Defendants' Praecipe for Additional Record. Filed November 8, 1916.

No. 37

STIPULATION AND ORDER AS TO RECORD

It is hereby stipulated by and between the parties plaintiff and defendant through their respective counsel, that in preparing the transcript and record on appeal all captions, except the name of the paper and number of the cause, except where specially noted in the Praecipe for record on appeal, and all verifications, all certificates of notaries public or other officers or officials to all depositions taken and also the stipulation with reference to taking the depositions, may be omitted, and that all indorsements except to show the name of the paper and date of filing, and all acceptances of service of papers, may be omitted.

PETERS & POWELL,
Attorneys for Plaintiff.
S. C. ROSE,
C. F. RIDDELL,
Attorneys for Defendants.

On reading the foregoing Stipulation as to the record on appeal in this cause it is ordered that said record may be so prepared and filed.

Dated at Seattle, Washington, this 2d day of November, 1916.

EDWARD E. CUSHMAN,
Judge of the above entitled Court.

Indorsed. Stipulation and Order as to Record. Filed November 2, 1916.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

No. 37

CHARLLES H. RUDDOCK and

TIMOTHY H. McCARTHY,
Plaintiffs, Appellants,
vs.
CLALLAM COUNTY, a municipal corporation and Clifford L. Babcock, Treasurer,
Defendants, Appellees.

UNITED STATES OF AMERICA
to
CLALLAM COUNTY, a municipal corporation and Clifford H. Babcock, Treasurer

CITATION

A GREETING:

You and each of you are hereby notified that in a certain suit in the United States District Court for the Western District of Washington, Northern Division, wherein Charles H. Ruddock and Timothy H. McCarthy are plaintiffs, and Clallam County and Clifford L. Babcock, Treasurer, are defendants, an appeal has been allowed the plaintiffs therein to the United States Circuit Court of Appeals for the Ninth Circuit.

You are hereby cited and admonished to be and appear in said United States Circuit Court of Appeals for the Ninth Circuit at the city of San Francisco, state of California, thirty days after the date of this citation, to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable E. E. Cushman, Judge of the United States District Court for the Western District of Washington, sitting in the Northern Division, this 27th day of October, 1916.

EDWARD E. CUSHMAN.
United States District Judge for the Western District of Washington, sitting in the Northern Division.

Received a copy of the above and foregoing Citation this 27th day of Oct., 1916.

SANFORD C. ROSE.
DEVILLO LEWIS.
J. E. FROST.
E. C. EWING.

JONES & RIDDELL.
Attorneys for above named appellees.

Indorsed: No. 37. In the District Court of the United States Western District of Washington, Northern Division. Charles H. Ruddock and Timothy H. McCarthy, Plaintiffs. Vs. Clallam County, et al., Defendants. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Oct. 27, 1916. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. Peters & Powell. Earle & Steinert. Attorneys for Plaintiffs. Rooms 546-551 New York Building, Seattle, Washington.

No. 37

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD

UNITED STATES OF AMERICA,
WESTERN DISTRICT OF
WASHINGTON—ss.

I, Frank L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify the foregoing 90 printed pages numbered from 1 to 90, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as are necessary to the hearing of said cause in the United States Circuit Court of Appeals for the Ninth Circuit, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record herein from the judgment of said United States District Court for the Western District of Washington, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the Complainants for making record, certificate or return to the United State Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, to wit:

Clerk's fee (Sec. 828 R. S. U. S.) for making record, certificate or return, 324 folios at 15c....$ 48.60

Certificate of Clerk to transcript of record—4 folios at 15c	.60
Seal to said Certificate	.20
Statement of cost of printing said transcript of record, collected and paid	93.10
TOTAL	$142.50

I hereby certify that the above cost for preparing, certifying and printing record amounts to $142.50, and has been paid to me by counsel for Complainants.

I further certify that I hereto attach and herewith transmit the original Citation issued in this cause and under separate cover the stipulation and order to hear this cause on the Printed Record of Evidence in Cause No. 36 Equity on Appeal herewith.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 21st day of December, 1916.

FRANK L. CROSBY,
(SEAL) Clerk U. S. District Court.

No. 2907

Re 2905

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLALLAM LUMBER COMPANY, a Corporation, Plaintiff,

Appellant

vs.

CLALLAM COUNTY, a Municipal Corporation, and HERBERT H. WOOD, Treasurer, Defendants,

Appellees

RECORD ON APPEAL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

SHERMAN PRINTING AND BINDING CO., SEATTLE, WASH.

NO.....

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLALLAM LUMBER COMPANY, a Corporation,
Plaintiff,

Appellant

vs.

CLALLAM COUNTY, a Municipal Corporation, and
HERBERT H. WOOD, Treasurer, Defendants,

Appellees

RECORD ON APPEAL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

SHERMAN PRINTING & BINDING CO., SEATTLE, WASH.

No. 56

INDEX TO PRINTED TRANSCRIPT OF RECORD

No. 56

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN
DIVISION

CLALLAM LUMBER COMPANY, a corporation,
Plaintiff

vs.

CLALLAM COUNTY, a municipal
corporation and Herbert H. Wood,
Treasurer,

Defendants.

NAMES AND ADDRESSES OF COUNSEL:

WILLIAM A PETERS, ESQ.,
Solicitor for Complainant,
546 New York Building, Seattle, Washington.

JOHN H POWELL, ESQ.,
Solicitor for Complainant,
546 New York Building, Seattle, Washington.

DAN EARLE, ESQ.,
Solicitor for Complainant,
436 Burke Building, Seattle, Washington.

WILLIAM J. STEINERT, ESQ.,
Solicitor for Complainant,
436 Burke Building, Seattle, Washington.

CHARLES F RIDDELL, ESQ.,
Solicitor for Defendants,
436 Burke Building, Seattle, Washington.

EDWIN C. EWING, ESQ.,
Solicitor for Defendants,
1116 Alaska Building, Seattle, Washington.

JOHN E. FROST, ESQ.,
Solicitor for Defendants,
Henry Building, Seattle, Washington.

SANFORD C. ROSE, ESQ.,
Solicitor for Defendants,
Port Angeles, Washington.

DEVILLO LEWIS, ESQ.,
Solicitor for Defendants,
Port Angeles, Washington.

RICHARD SAXE JONES, ESQ.,
Solicitor for Defendants,
627 Colman Building, Seattle, Washington.

STATEMENT.

Time of commencement of suit, March 6, 1915.

Names of parties to suit:

Clallam Lumber Company, a corportation, plaintiff, and appellant.

Clallam County, a municipal corporation and Herbert H. Wood, Treasurer, defendants and appellees.

Dates of filing respective pleadings:

Plaintiff's bill of complaint filed March 6, 1915.

Defendants' motion to dismiss filed March 25, 1915.

Order denying defendants motion to dismiss filed March 29, 1915.

Defendants' answer to complaint filed May 3, 1915.

Stipulation of parties with reference to amended answer, filed November 6, 1916.

On September 1, 1915, before the Hon. E. E. Cushman, Judge, this cause in conjunction with Equity Cause No. 36, entitled Clallam Lumber Company, a corporation, plaintiff, vs. Clallam County, a municipal corporation and Clifford L. Babcock, Treasurer, defendants; Equity Cause No. 37, entitled Charles H. Ruddock and Timothy H. McCarthy, plaintiffs, vs. Clallam County a municipal corporation and Clifford L. Babcock, Treasurer, defendants, and Equity Cause No. 57, entitled Charles H. Ruddock and Timothy H. McCarthy, plaintiffs, vs. Clallam County, a municipal corporation and Herbert H. Wood, Treasurer, defendants, the same being consolidated for trial, were tried upon the testimony of witnesses produced before the court, and upon exhibits offered in evidence by the respective parties, which have been returned herewith and filed herein, and upon the depositions taken under stipulation of the parties and exhibits annexed thereto.

Counsel for the respective parties appeared and

argued said causes in open court and thereafter submitted written briefs to said court.

Thereafter, on January 22, 1916, the Judge before whom said causes were tried and heard made and filed his memorandum decision.

Decree was made, entered and filed in said cause on February 3, 1916.

Plaintiff made and filed petition for rehearing March 3, 1916.

Argument had on petition to rehear before Hon. E. E. Cushman, Judge, and taken under advisement by him April 18, 1916.

Memorandum decision on petition to rehear rendered and filed by Hon. E. E. Cushman, Judge, on May 11, 1916.

Final order denying petition for rehearing made and filed May 15, 1916.

Journal entry of said court adjourning the November term and opening the May term of court May 2, 1916.

Plaintiff's statement of facts lodged with clerk and notice served on defendants Sept. 1st, 1916.

Assignment of errors, petition for appeal, allowance of appeal, bond on appeal with approval thereof, filed October 27, 1916.

Citation on appeal issued, served and filed October 27, 1916.

Statement of facts certified by Judge and filed Oct. 27, 1916.

Order of Court, E. E. Cushman, Judge, enlarging time to docket case on appeal and return of citation made and entered November 2, 1916.

Order of Judge of Circuit Court of Appeals on stipulation of parties permitting the presentation of this case and the statement of facts printed and sent up in Equity Case No. 36, Dec. 12, 1916.

In Equity, No. 56

BILL OF COMPLAINT

TO THE JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE WEST-

ERN DISTRICT OF WASHINGTON, NORTHERN DIVISION, sitting in equity:

Your orator Clallam Lumber Company, brings this its Bill of Complaint against Clallam County, a municipal corporation, and Herbert H. Wood, Treasurer of said county, and humbly complaining, respectfully shows unto your honor as follows:

I

Your orator is and for more than three years last past has been a corporation duly organized and existing under the laws of the state of Washington, and having its principal office for the transaction of business at Grand Rapids, in said state, and authorized as a foreign corporation to do business in the state of Washington. It has filed and recorded in the office of the Secretary of State of Washington a certified copy of its articles of incorporation, duly certified by the Secretary of the State of Michigan, who is the custodian of the same according to the laws of Michigan, and your orator has constituted and appointed an agent in the State of Washington, as required by the laws of that state, who resides at Seattle, where the principal business of the corporation in Washington is to be carried on, which appointment has been duly filed for record in the office of the Secretary of State of the State of Washington, and your orator has since had and kept such resident agent in Washington duly empowered as required by the statutes of that state, and has prior to the commencement of this suit, paid to the State of Washington its last annual license fee due to said state, and has in all respects complied with the laws of the State of Washington relative to the transaction of business by foreign corporations in that state. Your orator by its articles is duly authorized, among other things, to carry on a lumbering business and to own and hold timber lands. At all times herein mentioned, said Clallam Lumber Company was and it still is, a citizen of the State of Michigan and a resident and inhabitant of the city of Grand Rapids in that state.

II

That at all times herein mentioned the defendant County of Clallam was, and it still is, a county of the State of Washington, situate in the Northern Division of the Western District thereof, and as such, a municipal corporation under the constitution and laws of said state, and a citizen of the State of Washington.

III

The defendant Herbert H. Wood now is and ever since the 11th day of January, 1915, has been the duly elected, qualified and acting Treasurer of said County of Clallam, and a citizen of said State of Washington, and a resident and inhabitant of Clallam County in the Northern Division of the Western District thereof.

IV

The matter in controversy in this suit exceeds, exclusive of interest and costs, the sum of value of Three Thousand Dollars, and is to-wit, approximately the sum of Seventeen Thousand Five Hundred ($17,500) Dollars.

V

Your orator is the owner of certain timber lands situate in said Clallam County, a list of which, containing the correct description thereof, is hereto attached and marked Exhibit "A" and made a part hereof. Said lands contain, in the aggregate 41,372.8 acres of land, according to Government survey, be the same more or less. Your orator has been the owner of said lands for four years, or thereabouts, last past, save that a few descriptions, containing in the aggregate but a small acreage, were acquired within said period of four years. The lands so owned by your orator do not constitute one solid body, but lie either in contiguous parcels or in parcels near to each other in various townships in the interior of Clallam County, along the valleys of the Solduc and Calawa Rivers, and the benches and ridges between said rivers or on either side thereof, stretching from a short distance west of Cres-

cent Lake upon the east, in Township 30 North, Range 10 West, in a Westerly and Southerly direction toward the Pacific Ocean, the westerly portions of said lands being situate near the easterly edge of Townships 28 and 29 North, Range 14 West.

VI

For the purpose of assessment for taxation and as a basis therefor, the assessing officers of Clallam County have from time to time, within a period of five or six years last past, caused timber lands in said county to be cruised and the cruises and estimates thus made to be adopted by the county. Most of the timber lands in the county owned by private parties as distinguished from Government lands, have now been cruised, and all the lands owned by your orator have been so cruised, and so far as respects timber lands within the county upon which cruises have thus been made, it is claimed by the assessing officers that the same have been assessed upon the basis of the cruises thus obtained. The assessments made by the assessing officers of the County have been made however, according to certain zones or districts which the assessing officers have arbitrarily, unreasonably and unlawfully laid off and determined without reference to and in disregard of the true or fair value in money of timber on the lands within such zones or districts respectively.

VII

One of these zones thus arbitrarily laid off abuts immediately upon the Straits of Fuca and extends East and West along the Straits for a distance of approximately thirty-five miles, and extends back from the Straits into the interior distances varying approximately from three to eight miles. Within this zone are included those timber lands which, of all timber lands within the county, are of the greatest value, not merely because the timber thereon is of excellent quality, but particularly because of the location thereof, the same being situated immediately upon tidewater or adjacent thereto and thus rendered immediately accessible to the markets of the world. Within

this zone the timber is valued for the year 1914 by the assessing officers of Clallam County, as follows: Fir, spruce and cedar at 90 cents per thousand feet; hemlock at 40 cents per thousand feet. In both this and the other zones, as your orator is informed and believes, larch (if any there is), is valued at the same price as hemlock; and in this and all other zones, in addition to the value placed by the assessing officers on the timber, there was for the year 1914, placed on the lands themselves a value of $1.00 to $5.00 per acre, and the same, in the case of your orator's lands, was done arbitrarily, unreasonably and unlawfully and without any reference to the actual value thereof. Many of the lands owned by your orator are of no value whatsoever, independent of the timber standing or being thereon.

VIII

Another zone thus arbitrarily, unreasonably and unlawfully set off by the assessing officers lies in the Western part of Clallam County. No part thereof lies nearer to the Straits than approximately four to six miles, and no lands within this zone owned by your orator lie nearer to the Straits than approximately nine miles and the great body of the lands owned by your orator within this zone lies much more distant therefrom. Said zone or district is irregular in form and extends Southerly until it reaches the line of Jefferson County, a distance of approximately 30 miles from the Straits of Fuca. There are no harbors upon the Pacific Ocean within the County of Clallam or Jefferson at or through which the timber on the lands of your orator might or could be brought to market. Within the zone or district described in this paragraph there is a large acreage of land and upon the timber lands within this zone the assessing officers of Clallam County put for the year 1914, for the purposes of taxation, the following values, to-wit: Upon fir, spruce and cedar timber a valuation of 80 cents per thousand feet, and upon hemlock timber a valuation of 40 cents per thousand feet. In this zone your orator owns lands approximately 18,707.84 acres in

extent, and the timber upon the same, according to the cruise made by the County of Clallam, amounts in the aggregate, to approximately 1,231,286 ¾ M. feet of all sorts, as more fully appears from the schedule attached hereto marked Exhibit "B" and made a part hereof. The value of the lands of your orator within this zone as fixed and determined by the assessing officers of Clallam County for the year 1914, for the purposes of taxation, is $941,455.00. All the lands owned by your orator within this zone or the other zones or districts set off by said assessing officers are separated from the Straits of Fuca by a range of mountains.

IX

Another zone thus arbitrarily, unreasonably and unlawfully set off by the assessing officers includes Lake Crescent and certain lands contiguous thereto, and a township, or thereabouts of lands lying west of Lake Crescent. Upon the timber lands within this zone or district the assessing officers of Clallam County put, for the year 1914, for the purposes of taxation the following values, to-wit: Upon the fir, spruce and cedar timber a valuation of 80c per thousand feet, and upon hemlock timber a valuation of 30c per thousand feet. In this zone your orator owns lands approximately 3,207 acres in extent, and the timber upon the same, according to the cruise made by the County of Clallam amounts in the aggregate to approximately 138,052 ¾ M. feet of all sorts, as more fully appears from a schedule hereto attached as Exhibit "C" and made a part hereof. The value of the lands of your orator within this zone, as fixed and determined by the assessing officers of Clallam County for the year 1914 for purposes of taxation is $96,565. None of the lands of your orator within this zone lie nearer to the Straits than six miles, and between these lands and the Straits there is a high and practically impassable mountain range occupying the North portion of Township 30 North, Range 10 West, which the Government has never surveyed.

X

Another zone thus arbitrarily, unreasonably and

unlawfully set off by the assessing officers lies in the Southern Central part of said County, the North line thereof being approximately eight to fifteen miles from the Straits and the zone extending upon the South to the line of Jefferson County some twenty-seven miles distant from the Straits. Upon the timber lands within this zone or district the assessing officers of Clallam County put, for the year 1914, for the purposes of taxation, the following values, to-wit: Upon fir, spruce and cedar timber a valuation of 70c per thousand feet, and upon hemlock timber a valuation of 30c per thousand feet. In this zone or district your orator owns lands approximately 18,580.36 acres in extent, and the timber upon the same, according to the cruise made by the County of Clallam, amounts in the aggregate to approximately 1,112,949 M. feet of all sorts, as more fully appears from a schedule attached hereto marked Exhibit "D" and made a part hereof. The value of the lands of your orator within this zone, as fixed and determined by the assessing officers of Clallam County for the year 1914, for purposes of taxation is $654,700. None of the lands of your orator within this zone lies nearer to the Straits than eight miles, and some of the lands owned by your orator in this zone are twenty-one miles distant from the Straits. The lands owned by your orator in this zone or district extend to the edge of the unsurveyed lands in the main Olympic Mountains.

XI

Another zone, thus arbitrarily, unreasonably and unlawfully set off by the assessing officers is situate north of the Solduc Valley and on the Westerly slope of the aforesaid range of mountains, which separates said valley and all the lands of your orator from the Straits. This zone is composed in great part of rough and mountainous lands and there is comparatively a considerable quantity of burnt timber within the same. Upon the timber lands within this zone or district the assessing officers of Clallam County put for the year 1914, for the purposes of

taxation, the following values, to-wit: Upon fir, spruce, and cedar timber a valuation of 50c per thousand feet, and upon hemlock timber a valuation of 25c per thousand feet. In this zone your orator owns lands approximately 798½ acres in extent and the timber upon the same, according to the cruise made by the County of Clallam, amounts in the aggregate, approximately to 64,739½ M. feet of all sorts, as more fully appears from a schedule attached hereto, marked Exhibit "E" and made a part hereof. The value of the lands of your orator within this zone, as fixed and determined by the assessing officers of Clallam County, for the year 1914, for the purposes of taxation is $29,945. None of the lands of your orator within this zone lie nearer to the Straits than eight miles.

XII

Another zone thus arbitrarily, unreasonably and unlawfully set off by the assessing officers lies along the line of Jefferson County in that portion of Clallam County practically midway between the Easterly and Westerly ends thereof, and the same extends from the South line of Jefferson County North until it touches the North line of Township 29. This zone contains only a small acreage of lands owned by private parties, bordering upon the unsurveyed Government lands situate in the forest reserve. Upon the timber lands within this zone the assessing officers of Clallam County put for the year 1914, for the purposes of taxation the following values, to-wit: Upon fir, spruce and cedar timber a valuation of 50c per thousand feet, and upon hemlock timber a valuation of 25c per thousand feet. In this zone your orator owns lands approximately eighty acres in extent and the timber upon the same, according to the cruise made by the County of Clallam amounts in the aggregate, to approximately 4,052 M. feet of all sorts, as more fully appears from a schedule attached hereto marked Exhibit "F" and made a part hereof. The value of the lands of your orator within this zone, as fixed and determined by the assessing officers of Clallam County for the year 1914, for the purposes of

taxation is $2,350. The lands of your orator within this zone lie approximately nine miles from the Straits.

XIII

In addition to the assessed valuations placed on the timber on the lands owned by your orator, as herein recited, all poles and ties shown by the cruise so made by the County of Clallam are likewise assessed against your orator upon the following basis, to-wit: Poles 10c each and ties 2c each.

XIV

It is and has been during all the times in this bill alleged, the custom practiced throughout the State of Washington by assessors and taxing boards to assess property at less than its actual and full value, the custom being in a large part of the counties of the state to assess said property at from 35 to 50 per cent of its true value, which custom has not only been pursued by the various county assessors but has been recognized and acquiesced in by the State Board of Equalization. The assessor of said County of Clallam gives out and pretends that for the year 1914 he assessed taxable poperty within said county of Clallam at and upon the basis of fifty per cent of the true and fair value thereof in money; and the members of the County Board of Equalization give out and pretend that they equalized and approved the assessments upon the taxable property within said county for such year at and upon the same basis. But your orator avers that such claim and pretenses are untrue in fact and that the interior timber lands in said county, and in particular the lands owned by your orator, were and are valued for the purposes of taxation in the year 1914, at sums greatly in excess of fifty per cent of the true and fair value thereof in money; that the other properties, real and personal, in said county, were valued at sums much less than fifty per cent of the true and fair value thereof in money; and that your orator was grossly and intentionally discriminated against by the assessing officers of Clallam County in the matter of assess-

ment and taxation upon its said lands for the year 1914.

XV

The timber upon the lands of your orator, as shown by the cruise thus made by the County of Clallam, amount in the aggregate to approximately 2,551,-080 M. feet of all sorts, as more fully appears from a schedule attached hereto, marked Exhibit "G" and made a part hereof. The assessments upon the lands of your orator for the year 1914 were made upon the basis of said cruise, and your orator avers that the timber upon its lands was greatly overvalued by the assessing officers of Clallam Count in the valuations put thereon by them for the purposes of taxation in the year 1914. The valuations thus placed by the assessing officers of Clallam County upon the lands of your orator, described in said Exhitit "A" hereto attached, for the purposes of taxation for the year 1914, amount in the aggregate to $1,725,015. Your orator avers that the true and fair value in money of said lands does not exceed the sum of $2,050,-000 and did not exceed that sum in the year 1914 when said assessment was made by the assessing officers of Clallam County. Such assessment was therefore made upon the basis of approximately 84 per cent of the true and fair value thereof in money. No property in said Clallam County, save the timber lands owned by your orator, and perhaps certain other timber lands situate like your orator's lands in the interior of said county was assessed in said year 1914 at so great a proportion of the true and fair value thereof in money. Such assessment upon the lands of your orator at so large a percentage of the true and fair value thereof in money was not accidental or unintentional on the part of said assessing officers of Clallam County, but was intentional and wilful, and as your orator avers was in pursuance of a concerted effort and corrupt and unlawful combination and conspiracy between the assessor of Clallam County and the other members of the County Board of Equalization of said County of Clallam. Some of the facts

relating to the nature of said combination and conspiracy and to the unlawful assessment so made are hereinafter set forth.

XVI

The timber lands in the County of Clallam are situate for the most part in the westerly end thereof, the timbered portion of the county owned by private parties and subject to assessment being situate almost entirely within that portion of the county lying west of range eight and extending from thence practically to the Pacific Ocean. This territory is sparsely settled, containing only a few hundred inhabitants at the most and those settled for the great part at Forks and Quillayute Prairies (so called). Comparatively few of the voters of the county, therefore, reside in the west end district. The county seat of the county is the city of Port Angeles, in the middle district, said city containing a population of approximately 5,000 in number. In the east district (so-called) are prosperous farming communities, the same being well settled, particularly in the vicinity of Sequim and Dungeness, the population in said east district being approximately 1,500 in number. The voting power of the County is therefore, in the east and middle Commissioner's districts, and particularly in the easterly portion of the county extending from and including Port Angeles to the east county line, the voters in the west district being so few that they have little voice in the county affairs. The lands in the west end of the county, being almost entirely tibmered lands, except at the small prairies of Forks and Quillayute, are incapable at the present time of supporting any considerable population. These lands are mostly owned by non-residents of the county.

XVII

The assessing officers of the County of Clallam (with the exception of one county commissioner from the west district) are elected by the voters of those resident in the middle and east district, because of the preponderance of votes in those districts, and for the purpose, as your orator avers, of ingratiating themselves

with their constituents and serving their own individual and selfish ends, the said assessing officers of Clallam County have wrongfully, unlawfully and corruptly combined and concerted together with the intent and purpose to increase the assessments upon the timber lands in the west end of the county beyond their proportion of the true and fair value of the property within the county and to lower and depreciate the assessments upon the property in the city of Port Angeles, and contiguous thereto, or in that vicinity, the farming lands in the east end of the county and other properties within the county, and especially in the middle and east districts thereof and to assess the same upon a basis and at a valuation far below their proportion of the true and fair value of the property subject to assessment in Clallam County. In pursuance of this combination and conspiracy it has been the custom of the assessor of the County of Clallam to consult and advise with the other members of the County Board of Equalization, or with all those resident in the middle and east districts, in making his assessment rolls, and that custom as your orator is informed and believes, was followed by the assessor in making his assessment rolls for 1912, 1913 and 1914. The assessment roll, as prepared by the assessor, does not, therefore, and in each of the years above mentioned did not, represent the judgment of the assessor, but was and is the result of the combination and conspiracy with other members of said County Board of Equalization, and this roll, thus prepared by the assessing officer, is approved, as a matter of course, in all substantial respects, and particularly as relates to assessments of timber lands, by the County Board of Equalization when it meets to review the same. As a result, no fair hearing, as contemplated by statute, is possible to be had on appeal to said Board. And your orator avers that this practice has been followed in said Clallam County for several years continuously past, and that, when your orator appealed to said Board in the year 1910, its attorney addressed said Board at the opening of its session and

was told in substance by one of the members of said Board, speaking in its behalf, that it was needless to introduce any evidence of values of timber lands for no such evidence would change the views of said Board.

XVIII

In the years 1912, 1913 and 1914 and prior thereto, gross discriminations were practiced by the assessing officers of Clallam County against your orator and other owners of timber lands in the interior of the county and in favor of other owners of property subject to taxation in Clallam County. These discriminations were aimed in particular at your orator and other owners of interior timber for the reason that they own large bodies of lands in said county but control no votes and exercise no political influence therein, and the size of their holdings has constituted an inducement to said assessing officers to place a large and greatly disproportionate share of the taxes levied within the county upon your orator and such other owners within the county of some portion of that burden of taxation which, under the Constitution and laws of Washington, equitably and lawfully falls upon them. These discriminations thus practiced against your orator have been and are with the intent and purpose to favor, at the expense of your orator and other owners of interior timber lands, all owners of property at Port Angeles and in the vicinity thereof, all owners of property in the east district (so-called), all owners of personal property throughout the country, and likewise the owners of timber lands immediately upon the Straits.

XIX

Your orator has caused diligent and careful examination to be made of the assessment rolls of Clallam County for the years 1912, 1913 and 1914 and a like examination of property values within the county, and as a result thereof now finds that the lands and other properties situate at Port Angeles and subject to taxation are valued upon said assessment rolls as equalized for such years at not to

exceed 10 to 20 per cent of their true and fair value in money. The County Board of Equalization of Clallam County is, and for the years 1912, 1913 and 1914 was composed of five members of whom three are the county commissioners and the other two are the County Treasurer and County Assessor respectively. Of said members of the Board one County Commissioner, representing the middle district, resides at Port Angeles, and is Chairman of the Board. The County Treasurer and County Assessor also reside at Port Angeles. A fourth member resides in the east district, and the remaining member in the west district. Three out of five members of the County Board of Equalization are, therefore, residents of Port Angeles and the major part of the population of the county is also found at Port Angeles. These members of the Board resident at Port Angeles are themselves owners of property at Port Angeles. In order to favor themselves and their constituents at Port Angeles aforesaid, the three members resident at Port Angeles have combined and conspired with the east end Commissioner to put low valuations upon property at Port Angeles and vicinity and high and unequal valuations upon the timber lands situate in the west end of the county and in particular upon the timber lands of your orator and other owners of timber lands in the interior of Clallam County

XX

As the result of diligent and careful examination made by your orator of the assessment rolls of Clallam County for the years 1912, 1913 and 1914, and a like examination of the property values within the county, your orator finds that the farming lands and other properties situate in the east end and subject to taxation are valued upon said tax rolls so equalized for such years at not to exceed 25% to 30% of their true and fair value in money.

XXI

As the result of diligent and careful examination made by your orator of the assessment rolls of Clallam County for the years 1912, 1913 and 1914,

and a like examination of the property values within the county, your orator finds that personal property within said county, consisting of stocks and goods, wares and merchandise at Port Angeles and elsewhere within the county are valued at not to exceed 10 per cent to 15 per cent of their true and fair value in money.

XXII

The lands owned by your orator lie, as hereinbefore stated, in the valleys of the Solduc and Calawa Rivers and upon the benches and ridges between the same or adjacent thereto. These lands are at present wholly destitute of facilities for transportation and it is impossible to bring the timber thereon into the market. In order to bring said timber to market it is necessary that facilities be provided for transportation to Grays Harbor on the South or to the Straits of Fuca on the North. Grays Harbor is far distant, no railroad from that direction extending further north than Moclips, a distance of more than sixty miles from the lands of your orator. Few of the lands of your orator are less than twelve miles from the Straits and most of them lie a still greater distance therefrom and all of the lands of your orator are cut off from the Straits by the range of mountains running east and west through the County of Clallam. It is therefore, impossible to bring the timber from your orator's lands to market except by transporting the logs or lumber cut therefrom across this range of mountains. This cannot be accomplished except by the construction of a railroad at great expense. This expense is beyond any present means at the command of your orator and is likewise an expense which, in the present condition of the lumber market, or in any conditions of the lumber market which have at any time heretofore prevailed on the Pacific Coast, is prohibitive. This fact has a direct and important bearing on the present value of your orator's lands. Upon the Straits of Fuca however, and immediately adjoining tidewater, there lie fine bodies of fir, spruce, cedar and hemlock timber, which

can readily be logged to the Straits at the present time. Extensive logging operations have for many years been carried on and are now being carried on in this portion of Clallam County lying immediately upon the Straits. This Straits timber (so-called) is in the zone or district arbitrarily, unreasonably and unlawfully laid off by the assessing officers as recited in paragraph VII, in which zone or district the timber is valued, for the year 1914, by the assessing officers of Clallam County, as follows: Fir, spruce and cedar 90c per thousand feet, and hemlock at 40c per thousand feet; whereas upon the lands of your orator which lie within the interior of the County and separated from tide-water by a range of mountains, the timber is assessed at slightly lower figures, being for the most part 80c or 70c for fir, spruce and cedar, and 40c or 30c for hemlock. Your orator avers that the true and fair value in money of said timber so lying upon tide-water or adjacent thereto is at least twice the true and fair value in money of the timber on your orator's lands.

XXIII

The City of Port Angeles, where the majority of the voters of Clallam County reside, is situate at tide-water and upon a harbor which it is the wish of the inhabitants of said city may become the seat of a considerable commerce. To this end there is an ardent desire on the part of the inhabitants of Port Angeles that the timber owners of Clallam County build mills at Port Angeles, construct railroads into the interior of the county, transport logs from the interior of the county to Port Angeles, and saw the same into lumber at that city, thereby adding to the growth and development of Port Angeles as respects both industries and population. Various of the inhabitants of Port Angeles, including the assessor, have complained to your orator that, because it failed to build saw mills and railroads or cause the same to be done, it had pursued and was pursuing a policy hostile to the true interests of the county and especially of Port Angeles, and that such interests would be promoted only by

building saw mills and railroads; and your orator avers that as part of the combination and conspiracy aforesaid, it is the purpose of the assessing officers of Clallam County, representing as they believe, the sentiment existing among the voters at Port Angeles, to assess the timber lands in the west end of Clallam County at exorbitant sums, as a means of compelling the erection of mills at Port Angeles, the construction of railroads into the interior of the county, and the commencement and carrying on of logging and lumbering operations within the county. In particular it has been and is a part of said combination and conspiracy to compel your orator, as one of the large timber land owners of Clallam County, to erect such mills and construct such railroad and commence and conduct lumbering operations; and through influential citizens of Port Angeles your orator has been assured that if it would begin to operate its timber and employ a considerable number of men, it might rely that it would thenceforth be fairly and equitably treated as respects taxation. Your orator avers that the majority of the members of the Board of Equalization are themselves the owners of real property at Port Angeles and are therefore, personally interested in its rapid growth and development, and desire, for their individual aggrandizement, to compel your orator to erect mills and construct railroads and commence and conduct lumbering operations, despite the fact that no such operations can be conducted with profit in the market conditions now prevailing.

XXIV

Your orator avers that the unequal, discriminating and unlawful assessments which are herein complained of are not accidental or unintentional on the part of said assessing officers of Clallam County, but that the same are the direct and immediate result of a corrupt and unlawful intent on the part of the County Assessor for the County of Clallam, and the members of the County Board of Equalization of said county, or the majority of said members, to discriminate against the timber land owners in the west

end of said county, and particularly against your orator, in the matter of taxation, and in favor of all owners of property in the middle and east districts of the county, and unjustly and illegally to overvalue the property of your orator for purposes of taxation and to undervalue, for the purposes of taxation, other lands and properties within said County of Clallam including all property situate in Port Angeles or the vicinity thereof, all farming properties in the east end of said County of Clallam, and all other properties real or personal, in the middle and east districts, as well also as certain other timber lands in said county situate within the zone lying immediately upon the Straits, as set forth in paragraph VII of this bill.

XXV

Your orator avers that by Section 9112 of Volume 3 of Remington & Ballinger's Annotated Codes and Statutes of Washington it is provided that all property shall be assessed at not to exceed fifty per cent of its true and fair value in money; that the fair and true value in money of the lands owned by your orator and particularly described in Exhibit "A" hereto attached with the timber standing thereon, does not exceed the sum of $2,050,000, and did not exceed that sum when the assessments of 1912, 1913 and 1914 were made; that under said statute of the State of Washington any assessment of said lands for purposes of taxation at a greater sum than $1,025,000 is unjust, illegal, and void; that the true and fair value in money of the lands so owned by your orator is known to the assessor of said County of Clallam, as well as to the members of the County Board of Equalization thereof, and was so known at the time of the making of assessment, and at the time of the approval thereof by said Board of Equalization; but that, wholly disregarding the duty thus placed upon them by the law to assess said lands at no greater sum than one-half their true and fair value in money, the said assessor and the said Board of Equalization fraudulently and unlawfully caused the same to be assessed

at a sum exceeding by at least $700,015, the 50 per cent of the true and fair value in money of said lands, contrary to the provisions of the statute above specified, and that such over-assessment was made and approved by said assessing officers with the fraudulent and corrupt intent of placing upon your orator the burden of an excessive and unjust proportion of the taxes levied and collected within said County of Clallam for said year. The taxes levied for the year 1914 by the officers of Clallam County upon the lands owned by your orator, and described in Exhibit "A" amount, in the aggregate, to the sum of $42,960.78, as shown by the tax roll of said county for that year, whereas had such taxes been levied upon the true and fair value in money of the aforesaid lands, the same would not have exceeded the sum of $25,466; and your orator avers that by the fraudulent and unlawful practices of the assessing officers of Clallam County, of which complaint is herein made, there were and are unlawfully, unjustly and fraudulently imposed upon its lands described in Exhibit "A" taxes for the year 1914 to the amount of at least $17,494.78 in excess of all taxes which might or could equitably or lawfully be imposed thereon.

XXVI

The overtaxation of the lands of your orator and other owners of interior timber, and the undervaluation of other property in said county, of which complaint is herein made, are in pursuance of a definite, settled policy, design and plan systematically adopted by said assessing officers and practiced for several years last past. Your orator avers that the assesment of the lands of your orator and other owners of timber lands in the interior of Clallam County at sums which are proportionately much higher than the assessments imposed upon the other properties, real and personal, in said county, is and results in an actual fraud upon your orator, and the said plan so resulting in such fraud upon your orator was and is arbitrarily and systematically adopted and carried out by the asses-

sor and members of the County Board of Equalization and by the defendants herein.

XXVII

The assessments upon the lands of your orator were made by the Assessor of said county for the year 1912 at the high, excessive, unlawful and illegal rates herein specified, and upon the unlawful and fraudulent basis herein mentioned. Thereafter the County Board of Equalization met ostensibly to consider and review the assessment roll. But such review was ostensible, specious and fraudulent in character, the members of the Board having already combined and conspired with said Assessor to make the assessments upon the basis and at the amounts hereinbefore mentioned. Your orator, through its managing officer and attorneys, appeared before the County Board of Equalization when the same was sitting at its regular session in 1912 and protested against said excessive, unjust and unlawful assessments upon its lands. Such protest was both oral and in writing. The protests so made by your orator, both oral and in writing, were arbitrarily disregarded and overruled by said Board, and the petition so filed by your orator to equalize its assessments and put the assesments on the property of your orator on the same basis as the assessments upon other property in said county, was arbitrarily denied.

XXVIII

The assessments upon the lands of your orator were made by the Assessor of said county for the year 1913, at the high, excessive, unlawful and illegal amounts and rates herein specified, and upon the unlawful and fraudulent basis herein mentioned. Thereafter the County Board of Equalization met ostensibly to consider and review the assessment roll, but such review was ostensible, specious and fraudulent in character, the members of the Board having already combined and conspired with said Assessor to make the assessments upon the basis and at the amounts hereinbefore mentioned. Your orator, through its attorney, appeared before the County Board of Equali-

zation when the same was sitting at its regular session in 1913 and protested against said excessive, unjust and unlawful assessments upon its lands. The protests so made, both orally and in writing were arbitrarily disregarded and overruled by said Board, and the petition of your orator to equalize its assessments and put the same on the same basis as the assessments upon other properties in said county was arbitrarily and unlawfully denied.

XXIX

The assessments upon the lands of your orator were made by the Assessor of said county for the year 1914 at the high, excessive, unlawful and illegal amounts and rates herein specified, and upon the unlawful and fraudulent basis herein mentioned. Thereafter the County Board of Equalization met ostensibly to consider and review the assessment roll, but such review was ostensible, specious and fraudulent in chaaracter, the members of said Board having already combined and conspired with said Assessor to make the assessments upon the basis and at the amounts hereinbefore mentioned. Your orator, through its attorney appeared before the County Board of Equalization when the same was sitting at its regular session in 1914 and protested against said excessive, unjust and unlawful assessments upon its lands. The protests so made, both orally and in writing, were arbitrarily disregarded and overruled by said Board, and the petition of your orator to equalize its assessments and put the same on the same basis as the assessments upon other properties in said county was arbitrarily and unlawfully denied.

XXX

Thereafter the taxes were extended against the lands of your orator upon the rolls and books of said county, the same being so extended upon the basis of the high, excessive, unlawful and fraudulent assessments upon the lands of your orator, of which complaint is herein made. Said tax rolls and books were delivered to the defendant Herbert H. Wood, Treasurer of said county, and said Herbert H. Wood,

as such Treasurer has demanded payment of said illegal, fraudulent and arbitrary taxes assessed and levied in manner as hereinbefore specified. The taxes so demanded by said Herbert H. Wood, Treasurer of said county, amount in the aggregate, to the sum of $42,960.75 and said Treasurer, unless restrained by the order of this court will sell the property of your orator to satisfy the taxes thus fraudulently and unlawfully assessed and levied.

XXXI

That prior to the assessment and levy of the taxes complained of herein this complainant under instruments of conveyance conveying to it all of the lands hereinabove described, was in the actual possession and occupation of a portion of said lands for the whole; otherwise said lands are vacant and unoccupied.

XXXII

That it is the duty of the Treasurer of Clallam County under the law of the state, after receiving the moneys so taxed, to pay the sum so received in the proportions designated in his tax books to the various road and bridge funds and to the City of Port Angeles and to the State of Washington and to the various funds for which said taxes are collected and distributed under the law, and to other officers and authorities entitled to receive the same, and if the plaintiff instituted suit to recover back the taxes so paid to the town of Port Angeles or county, or road, or school districts, it would be obliged to bring suit against each one of the taxing bodies receiving its proportionate share of the tax, thereby necessitating a multiplicity of suits, and the proportion of the tax which would go to the state of Washington could not be collected back by any legal proceeding whatever; and if repayment could be compelled from the town of Port Angeles and other taxing bodies, such repayment would not cover the cost, including commissions deducted for collection of the tax, and penalties, and complainant would be subject to great and irreparable injury for

which there was not a complete, adequate, or any remedy at law.

That the Treasurer of Clallam County is required under the law, upon the delinquency of said taxes, to immediately issue delinquent certificates against said lands, under which same are authorized to be sold and would be sold to pay said taxes. The levy and existence of said tax and the threatened issuance of delinquent certificates and sale thereunder constitute a cloud upon plaintiff's title to said lands and all of them.

XXXIII

That upon the 24th day of February, 1915, your orator tendered and offered to pay to said Herbert H. Wood, Treasurer of Clallam County, and to said Clallam County, the defendants herein, the full and true sum of $25,466 lawful money of the United States, in payment of the taxes levied upon its lands in said County of Clallam for the year 1914; which tender was refused and your orator avers that the sum thus tendered is more than the taxes justly and equitably due from your orator to the defendants upon its lands aforesaid for such year, including all penalties, interest and cost, and more than the full amount which your orator would be required to pay if its property were assessed upon the same basis as all other property in Clallam County, or if said assessments were legal and equitable or equal and uniform with or compared to the assessments upon all other property within said county. Your orator brings into court the sum of money in this paragraph specified and tenders and offers to pay, and does hereby pay the same, to and for the use and benefit of the defendant County of Clallam and your orator offers to pay and will pay any such other and further amounts as the court may find to be justly due from it or equitably owing by it to said Clallam County. And your orator avers that the taxes upon its said lands for all years prior to 1914 have been paid and that the taxes for the year 1914 have been paid and discharged by the tender and payment herein specified.

XXXIV

Your orator avers that, by reason of the facts hereinbefore recited, the assessment of your orator's lands for taxation for the year 1914 is arbitrary, unjust, illegal and fraudulent as compared with the assessment of all other property in said Clallam County, and that such unlawful and fraudulent assessment is prohibited by the Constitution of the State of Washington, and that the assessment so made is, in particular, in violation of and contrary to Section 2, Article VII of the Constitution of the State of Washington, in and by which it is provided that assessments and taxes shall be uniform and equal on all property in said state, according to its value in money, and that there shall be secured a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property; and that the assessment so made is also in violation of and contrary to Section 1 of Article VII of the Constitution of the State of Washington which declares that all property in the state not exempt under the laws of the United States, or under said State Constitution, shall be taxed in proportion to its value. And your orator avers that in truth and in fact the taxes upon its lands, described in Exhibit "A" are not uniform and equal as compared with all other property in said County of Clallam.

XXXV

Your orator avers that if the assessment and levy of taxes for the year 1914 upon its lands in Clallam County, hereinbefore described, be not set aside, vacated and held for naught the same will result in the taking of the property of your orator without due process of law, and in denying to your orator the equal protection of the laws, contrary to the provisions of the XIVth Amendment to the Constitution of the United States, which provides that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. And your orator prays

the protection afforded by said XIVth Amendment to the Constitution of the United States, and avers that this suit arises under the Constitution and Laws of the United States, and that for this reason, as well as because of the diverse citizenship of the parties, this Court has jurisdiction thereof.

XXXVI

The plaintiff is remediless at and by the strict rules of the common law, and is relievable only in court of equity where matters of this sort are properly cognizable and relievable.

XXXVII

Your orator therefore asks the aid of this court in the premises and prays:

(a) That the County of Clallam, a municipal corporation, and Herbert H. Wood, Treasurer of said County, answer this bill without oath, answer under oath of said defendants being hereby expressly waived.

(b) That this court decree that the assessments and taxes for the year 1914, imposed by the assessing and taxing officers of the County of Clallam upon the lands of your orator, are unlawful, fraudulent and void; that the same are contrary to and in violation of the Constitution and Laws of the State of Washington and the provisions of the XIVth Amendment to the Constitution of the United States.

(c) That this Court determine and decree what sums were or are justly and equitably owing by your orator for the taxes for the year 1914 upon its lands in Clallam County, described in Exhibit "A" hereto attached, and what assessments and taxes upon its lands are equal and uniform with or compared to the assessments and taxes upon all other property in said county.

(d) That it be determined and decreed that the sum of $25,466 tendered by your orator to said defendants, is sufficient to pay all sums which were or are justly and equitably owing by your orator for the taxes for the year 1914, upon its lands in said County of Clallam, described in said Exhibit "A".

(e) That said defendants, and each of them, be

permanently enjoined and restrained from attempting to collect for the taxes of the year 1914 any sum whatever in addition to those already tendered, and from selling or attempting to sell the lands or property of your orator, or any part thereof, to satisfy said taxes so levied for the year 1914 upon its lands in Clallam County, and that the cloud upon the title of your orator to its said lands which exists because or by reason of such unjust, illegal and fraudulent taxes, so levied, be forthwith removed and cancelled.

(f) That said defendants and each of them, be in like manner enjoined until the further order of this Court.

(g) That such other or further order or decree be made in the premises as the nature of the case may require, and as to the Court shall deem meet.

XXXVIII

May it please your Honor to grant unto your orator the writ of injunction to be issued out of and under the seal of this Court in due form of law, permanently enjoining and restraining said defendants County of Clallam and Herbert H. Wood, Treasurer of said county, and each of them, from attempting to collect for the taxes of the year 1914 any sum or sums whatsoever in addition to those already tendered by your orator, and from selling or attempting to sell the lands or property of your orator, or any part thereof, to satisfy said taxes so levied for the year 1914 upon its lands in Clallam County; and that a writ of injunction be issued enjoining and restraining the defendants and each of them in like manner as herein prayed until the further order of this Court.

XXXIX

May it please the Court, the premises being considered to grant unto your orator the writ of subpoena to be issued out of and under the seal of this Court, directed to said County of Clallam, a municipal corporation, and Herbert H. Wood, treasurer of said County of Clallam, commanding them and each of

them to appear before this Court at a date therein specified and answer this bill of complaint.

And your orator will ever pray, etc.

CLALLAM LUMBER COMPANY.
By DAN EARLE.

PETERS & POWELL,
EARLE & STEINERT,
Attorneys for Complainant.

UNITED STATES OF AMERICA,
STATE OF WASHINGTON,
COUNTY OF KING.

ss.

On this 6th day of March, 1915, before me, a Notary Public in and for the State of Washington, personally appeared Dan Earle, to me known to be the person who subscribed the foregoing Bill of Complaint in complainant's behalf, who made oath and says that he subscribed the name of complainant to the foregoing Bill of Complaint; that he is properly authorized to do so; that he is the attorney of said Clallam Lumber Company, a Michigan corporation; that no officer of said corporation is now within the State of Washington; that affiant has read the Bill of Complaint by him subscribed and knows the contents thereof, and the same is true of his own knowledge except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

(Seal.) VOLNEY P. EVERS,
Notary Public in and for the State of Washington, residing at Seattle, Washington.

EXHIBIT "A"

Tp.	Rg.	Sec.	Description	Acres
29	13	12	SE¼ of SE¼	40
28	13	17	NW¼ of SW¼	40
28	14	9	SE¼ of SE¼	40
"	"	12	NE¼	160
"	"	"	S½ of NW¼	80
"	"	13	SE¼ of SE¼	40
"	"	14	Lot 4	34.50

"	"	"	N½ of SW¼	80
"	"	"	SW¼ of SW¼	40
"	"	15	NW¼ of SW¼	40
"	"	24	N½ of NE¼	80
29	14	1	Lot 1	40.19
"	"	"	" 2	41.04
"	"	"	" 3	41.99
"	"	"	NE¼ of SW¼	40
28	13	2	Lot 4	38.71
"	"	3	" 1	35.50
"	"	"	" 4	39.82
"	"	"	NW¼ of W½ of SE¼ of NW¼	10
"	"	4	Lot 4	29.25
"	"	4	" 7	38.25
"	"	"	NE¼ of SW¼	40
"	"	"	SE¼ of SW¼	40
"	"	7	Lot 8	86.50
"	"	"	NW¼ of NE¼	40
"	"	"	SW¼ of NE¼	40
"	"	"	NE¼ of NW¼	40
"	"	"	SE¼ of NW¼	40
"	"	"	SE¼	160
"	"	8	S½ of NE¼	80
"	"	"	Lot 3	27
"	"	"	" 4	37.75
"	"	"	" 5	49.50
"	"	"	N½ of SW¼	80
"	"	"	SW¼ of SW¼	40
"	"	9	SW¼ of NW¼	40
"	"	18	N½ of NE¼	80
"	"	"	NW¼ of SE¼	40
"	"	"	NE¼ of SW¼	40
29	13	1	SE¼	160
"	"	"	S½ of SW¼	80
"	"	"	Lot 1	42.75
"	"	"	" 2	18.65
"	"	"	" 3	16.05
"	"	"	" 4	37.02
"	"	"	31-63/100 acres in Lot 5	31.63
"	"	"	Lot 6	31.80
"	"	"	" 7	35.75

"	"	2	SE¼ of SE¼	40
"	"	"	Lot 1	41
"	"	"	" 2	24.30
"	"	"	" 3	33.40
"	"	"	" 4	37
"	"	"	" 7	7.80
"	"	"	" 8	24.20
"	"	"	" 10	9.75
			Forwarded	2,643.10

Tp.	Rg.	Sec.	Description	Acres
			Forwarded	2643.10
29	13	2	Lot 11	38.15
"	"	"	" 12	31.60
"	"	"	" 13	39.55
"	"	"	" 15	38.25
"	"	3	SW¼ of SE¼	40
"	"	"	Lot 3, except right of way	42.85
"	"	"	Lot 4, except right of way	39.52
"	"	"	Lot 5, except right of way	18.94
"	"	"	" 6	27.80
"	"	"	" 7	16
"	"	"	" 8	22.15
"	"	"	" 9	7.30
"	"	"	" 10	38.05
"	"	"	" 11	16.50
"	"	"	" 13	39.70
"	"	"	" 14	37
"	"	4	NE¼ of SE¼, except right of way	39.56
"	"	"	NW¼ of SE¼	40
"	"	"	Lot 1	40.21
"	"	"	SE¼ of SE¼, except right of way	37.67
"	"	"	SW¼ of SE¼	40
"	"	6	Lot 2	38.49
"	"	"	Lot 3	35.68
"	"	"	" 4	46.43
"	"	"	NW¼ of SE¼	40
"	"	8	N½ of NE ¼	80
"	"	"	SW¼ of NE¼	40
"	"	"	NW¼ of SE¼	40
"	"	9	Lot 1, except right of way	39.66

"	"	"	Lot 2,	" "	20.15
"	"	"	" 3,	" "	32.94
"	"	"	" 4,	" "	29.80
"	"	"	" 5,	" "	32.93
"	"	"	" 6		31.20
"	"	"	" 7		17.15
"	"	"	" 8		42.30
"	"	9	" 9		39.10
"	"	"	NW¼ of NE ¼, except right of way		37.48
"	"	"	NE¼ of NW¼		40
"	"	"	NE¼ of SE ¼		40
"	"	"	SE¼ of SW¼		40
"	"	"	W½ of SW¼		80
"	"	10	NE¼		160
"	"	"	Lot 1		33.40
"	"	"	" 2		6.25
"	"	"	" 3		31.20
"	"	"	" 4		39.80
"	"	"	NW¼ of SE¼		40
"	"	"	SW¼ of SE¼		40
"	"	"	NW¼ of SW¼		40
"	"	"	S½ of SW¼		80
"	"	11	NE¼		160
"	"	"	NW¼ of NW¼		40
"	"	"	SW¼ of NW¼		40
"	"	12	NE¼		160
"	"	"	NW¼		160
"	"	"	NE¼ of SE¼		40
"	"	13	NE¼ of NE¼		40
			Forwarded		5,287.86

Twp.	Range	Section	Description	Acres
			Forwarded	5287.86
29	13	14	SW¼ of SW¼	40
"	"	15	NW¼ of NE¼	40
"	"	"	N½ of NW¼	80
"	"	"	SE¼	160
"	"	"	NE¼ of SW¼	40
"	"	"	SE¼ of SW¼	40
"	"	16	NE¼ of NE¼	40

"	"	"	SE¼ of NE¼	40
"	"	"	2-30/100 acres in SE of SE	2.30
"	"	"	NW¼ of SW¼ except right of way	38.13
"	"	"	Lot 1, except right of way	36.85
"	"	"	" 7	34.20
"	"	"	" 8	29.50
"	"	17	NE¼	160
"	"	"	NE¼ of NW¼	40
"	"	"	SE¼ of NW¼	40
"	"	"	NW¼ of SE¼	40
"	"	"	SW¼ of SE¼	40
"	"	"	NE¼ of SW¼	40
"	"	"	SE¼ of SW¼	40
"	"	20	SW¼ of NE¼	40
"	"	"	SE¼ of NW¼	40
"	"	"	N½ of SE¼	80
"	"	21	Lot 1	39.75
"	"	"	Lot 2, except 1-85/100 acres	27.60
"	"	"	Lot 3	34.05
"	"	"	Lot 7	7.25
"	"	"	Lot 10	15.30
"	"	22	N½ of NW¼	80.
"	"	22	SE¼ of NW¼	40
"	"	"	Lot 1	29.15
"	"	"	" 4	38.60
"	"	26	SW¼ of SE¼	40
"	"	27	NW¼ of NW¼	40
"	"	"	SW¼ of NW¼	40
"	"	"	SE¼	160
"	"	28	Lot 7	37.15
"	"	"	" 8	34.55
"	"	"	" 9	25.95
"	"	"	" 10	31.45
"	"	"	" 11	7.15
"	"	"	NE¼ of SE¼	40
"	"	31	SE¼ of NE¼	40
"	"	"	Lot 1	45.57
"	"	"	" 2	45.53
"	"	"	" 3	11.30
"	"	"	" 8	30.50

"	"	32	SW¼	160
"	"	33	NE¼ of NE¼	40
"	"	33	NE¼ of NW¼	40
"	"	"	Lot 1	30.50
"	"	"	SW¼ of NW¼	40
"	"	"	SW¼	160
"	"	34	NW¼ of NE¼	40
"	"	"	SE¼ of NE¼	40
"	"	"	NW of NW	40
"	"	"	S½ of NW¼	80
"	"	35	NW¼ of NE¼	40
"	"	"	S½ of NE¼	80
			Forwarded	8200.19

Twp.	Range	Section	Description	Acres
			Forwarded	8200.19
29	13	35	S½ of NW¼	80
30	13	10	N½ of SE¼	80
"	"	20	NE¼ of NE¼	40
"	"	"	SE¼ of NE¼	40
"	"	"	NW¼ of NW¼	40
"	"	"	SW¼ of NW¼	40
"	"	"	SE¼	160
"	"	"	NW¼ of SW¼	40
"	"	"	S½ of SW¼	80
"	"	23	SE¼	160
"	"	24	SE¼ of SE¼	40
"	"	25	NE¼ of NW¼	40
"	"	"	NW¼ of SE¼	40
"	"	"	SW¼ of SE¼	40
"	"	"	Lot 5	18.10
"	"	"	" 6	26.55
"	"	"	" 7	39.30
"	"	26	NW¼	160
"	"	29	NW¼ of NE¼	40
"	"	"	SW¼ of NE¼	40
"	"	"	NW¼	160
"	"	30	NE¼	160
"	"	31	NE¼ of NW¼	40
"	"	"	Lot 1	39.30
"	"	"	" 2	39.50

"	"	"	NW¼ of SE¼	40
"	"	"	NE¼ of SW¼	40
"	"	"	Lot 3	39.70
"	"	"	SE¼ of SW¼	40
"	"	"	Lot 4	39.90
"	"	33	NE¼ of SE¼	40
"	"	"	SE¼ of SE¼	40
"	"	34	NW¼ of SW¼	40
"	"	"	SW¼ of SW¼	40
"	"	35	Lot 3, except right of way	37.58
"	"	"	Lot 5	11.20
"	"	"	" 6	25.50
"	"	"	NE¼ of SE¼ except right of way	38.10
"	"	"	NW¼ of SE¼ except right of way	38.13
"	"	"	S½ of SE¼	80
"	"	"	S½ of SW¼	80
"	"	36	Lot 1	30.45
"	"	"	" 6	39.80
"	"	"	" 7	14.50
"	"	"	" 8	17.35
"	"	"	" 10	16.25
"	"	"	East 13 acres of Lot 11	13
"	"	"	NW¼ SW¼ except right of way	38.08
"	"	"	SW¼ of SW¼	40
29	12	1	S½ of SE¼	80
"	"	2	S½ of SE¼	80
"	"	"	S½ of SW¼	80
"	"	3	S½ of SE¼	80
"	"	"	SE¼ of SW¼	40
"	"	4	SW¼ of SE¼	40
"	"	"	NW¼ of SW¼	40
"	"	"	S½ of SW¼	80
"	"	"	Lot 4	37.23
"	"	5	All of	476.16
"	"	6	N½ of SE¼	80
"	"	"	SE¼ of SE¼	40
"	"	"	NE¼ of SW¼	40
"	"	"	SE¼ of SW¼	40
			Forwarded	11,995.87

Twp.	Range	Section	Description	Acres
			Forwarded	11,995.87
29	12	6	Lot 1	40.89
"	"	"	" 2	41.76
"	"	"	" 3	40.64
"	"	"	" 5	32.40
"	"	"	" 6	34.60
"	"	"	" 7	35.13
"	"	7	All of	623.60
"	"	8	N½ of	320
"	"	9	N½ of	320
"	"	10	NE¼	160
"	"	"	NE¼ of NW¼	40
"	"	"	S½ of NW¼	80
"	"	"	SE¼	160
"	"	"	SW¼	160
"	"	11	All of	640
"	"	12	All of	640
"	"	13	All of	640
"	"	14	All of	640
"	"	15	All of	640
"	"	20	SE¼	160
"	"	21	NE¼	160
"	"	"	N½ of SE¼	80
"	"	"	SW¼ of SE¼	40
"	"	"	SW¼	160
"	"	22	All of	640
"	"	23	All of	640
"	"	24	NE¼	160
"	"	"	NW¼	160
"	"	"	NW¼ of SE¼	40
"	"	"	SW¼ of SE¼	40
"	"	"	SW¼	160
"	"	25	NW¼ of NE¼	40
"	"	26	NW¼	160
"	"	27	NE¼	160
"	"	"	N½ of NW¼	80
"	"	"	SW¼ of NW¼	40
"	"	"	SE¼	160
"	"	"	SW¼	160
"	"	28	NE¼	160

"	"	"	NW¼	160
"	"	"	NE¼ of SE¼	40
"	"	"	S½ of SW¼	80
"	"	29	NE¼	160
"	"	"	NW¼ of SE¼	40
"	"	"	SW¼ of SE¼	40
"	11	18	All of	646.88
"	"	19	S½ of NE¼	80
"	"	20	NE¼	160
"	"	"	S½ of NW¼	80
"	"	21	NW¼	160
30	"	7	SE¼ of NW¼	40
"	"	"	SE¼ of SE¼	40
"	"	"	NE¼ of SW¼	40
"	"	"	Lot 3	29.40
"	"	"	SE¼ of SW¼	40
"	"	8	SE¼ of SE¼	40
"	"	9	S½ of SW¼	80
"	"	16	N½ of NW¼	80
			Forwarded	22,720.37

Twp.	Range	Section	Description	Acres
			Forwarded	22,720.37
30	11	17	NE¼ of NE¼	40
"	"	"	S½ of NE¼	80
"	"	"	SW¼ of NW¼	40
"	"	18	NE¼ of NE¼	40
"	"	"	SE¼ of NE¼	40
"	"	"	SE¼ of NW¼	40
"	"	"	NE¼ of SW¼	40
"	"	"	Lot 3	24.82
"	"	"	SE¼ of SW¼	40
"	"	"	Lot 4	24.28
"	"	25	SW¼ of NE¼	40
"	"	"	NW¼ of SE¼	40
"	"	"	Lot 1	38
"	"	"	" 6	4.90
"	"	"	" 7	6.50
"	"	"	" 10	15.39
"	"	"	" 12	19.60
"	"	26	SW¼ of NW¼	40

"	"	"	S½ of SE¼	80
"	"	"	SE¼ of SW¼	40
"	"	"	Lot 3	39.78
"	"	"	" 4	41.16
"	"	"	" 5	11.30
"	"	"	" 6	22
"	"	"	" 7	41.50
"	"	"	" 8	38
"	"	27	SW¼	160
"	"	"	Lot 6	11
"	"	"	" 8	5.10
"	"	"	" 10	23.30
"	"	28	" 1	1.90
"	"	"	" 4	23.10
"	"	"	" 5	23.50
"	"	"	" 8	5.85
"	"	"	" 10	4.75
"	"	"	" 12	4.60
"	"	29	" 1	.10
"	"	30	SE¼ of SW¼	40
"	"	31	S½ of SE¼	80
"	"	"	Lot 1	8.75
"	"	"	" 12, except South 12 acres	9.80
"	"	32	S½ of NE¼	80
"	"	"	S½ of NW¼	80
"	"	"	N½ of SE¼	80
"	"	"	SW¼ of SE¼	40
"	"	"	SW¼	160
"	"	"	Lot 1	25.20
"	"	"	" 6	21
"	"	"	" 7	11
"	"	"	" 8	12.20
"	"	33	NE¼	160
"	"	"	NW¼	160
"	"	"	NE¼ of SE¼	40
"	"	"	N½ of SW¼	80
"	"	34	NW¼ of NE¼	40
"	"	"	NW¼	160
"	"	"	S½ of SE¼	80
"	"	"	SW¼	160
"	"	35	N½ of NE¼	80

"	"	"	SW¼ of SW¼	40
			Forwarded	25,558.75
Twp.	Range	Section	Description	Acres
			Forwarded	25,558.75
29	10	3	N½ of NE¼	80
30	10	24	S½ of SW¼	80
"	"	25	NE¼ of NE¼	40
"	"	"	NE¼ NE¼ except right of way	39.48
"	"	"	SE¼ NE¼ " "	38.96
"	"	"	SW¼ NE¼ " "	39.48
"	"	"	NE¼ of NW¼ " "	38.83
"	"	"	NW¼ NW¼ " "	39.05
30	12	27	Lot 3	4.75
"	"	28	NW¼ of NE¼	40
"	"	"	SW¼ of NE¼	40
"	"	"	NW¼ of SE¼	40
"	"	"	Lot 1	3.50
"	"	"	" 2	30.85
"	"	"	" 3	38.50
"	"	"	" 4	38.90
"	"	"	" 6	8.40
"	"	29	NW¼ NE¼ except part of Sappho and 17/100 acres	38.67
"	"	"	SW¼ of NE¼	40
"	"	"	NE¼ of NW¼, except 6-45/100 acres	33.55
"	"	"	NW¼ of NW¼	40
"	"	"	S½ of NW¼	80
"	"	"	NE¼ of SE¼	40
"	"	"	NW¼ of SW¼	40
"	"	"	Lot 1	31.80
"	"	"	" 2	26
"	"	"	" 3	17.90
"	"	"	" 4	13.85
"	"	"	" 5	38.90
"	"	"	" 6	8.20
"	"	"	" 7	4.25
"	"	"	" 8	30.18
"	"	"	" 9	29.60
"	"	"	" 10	5.75

"	"	30	NE¼ of NE¼	40
"	"	"	S½ of NE¼	80
"	"	"	SW¼ of SE¼	40
"	"	"	Lot 1	30.92
"	"	"	" 7	7.50
"	"	"	" 8	21
"	"	"	" 10	32.20
"	"	"	" 11	11
"	"	"	" 12	25.50
"	"	"	" 13	7.45
"	"	"	" 14	20.75
"	"	31	NE¼	160
"	"	"	NE¼ of NW¼ of Lot 7	40
"	"	"	SE¼ of NW¼	40
"	"	"	SE¼	160
"	"	"	NE¼ of SW¼	40
"	"	"	SE¼ of SW¼	40
"	"	"	Lot 2	21.30
"	"	"	" 3	35.06
"	"	"	" 4	35.82
"	"	"	" 5	33.08
"	"	32	" 2	30.15
"	"	"	NW¼ of NE¼	40
"	"	"	S½ of NE¼	80
"	"	"	NW¼	160
"	"	"	SE¼	160
"	"	"	SW¼	160
			Forwarded	28,269.83

Twp.	Range	Section	Description	Acres
			Forwarded	28,269.83
30	12	33	S½ of NW¼	80
"	"	"	N½ of SW¼	80
"	"	"	Lot 1	28.15
"	"	"	" 2	22.85
"	"	"	" 3	9.50
"	"	"	" 4	30.50
"	"	"	" 8	31.15
"	"	"	" 5	37.50
"	"	"	" 9	29.50
"	"	34	" 4	7.15

"	"	"	" 5	32.35
"	"	"	" 7	35.10
"	"	36	SE¼ of SW¼	40
"	"	"	Lot 6	10.76
"	"	"	" 7	36.79
"	"	"	" 9	38.10
"	"	"	" 11	20
29	11	3	" 1	29.32
"	"	"	" 2	29.59
"	"	"	" 3	29.36
"	"	"	" 4	29.13
"	"	5	" 2	29.32
"	"	"	" 3	29.42
"	"	"	" 4	29.50
"	"	"	" 5	40
"	"	"	" 6	40
"	"	"	" 7	40
"	"	"	" 8	40
"	"	6	" 1	29.75
"	"	7	NE¼ of NE¼	40
"	"	"	Lot 2	41.80
"	"	"	NE¼ of SE¼	40
"	"	"	SE¼ of SE¼	40
"	"	"	Lot 3	43.70
"	"	"	SE¼ of SW¼	40
"	"	"	Lot 4	41.59
"	"	8	NE¼	160
"	"	"	NW¼ of NW¼	40
"	"	"	SE¼	160
"	"	"	SW¼	160
"	"	9	NW¼ of NE¼	40
"	"	"	SW¼ of NE¼	40
"	"	"	NE¼ of NW¼	40
"	"	"	SE¼ of NW¼	40
"	"	"	S½ of SE¼	80
"	"	"	S½ of SW¼	80
"	"	10	N½ of SE¼	80
"	"	"	SE¼ of SE¼	40
"	"	"	NE¼ of SW¼	40
"	"	16	NW¼ of NE¼	40
"	"	"	N½ of NW¼	80

"	"	"	SW¼ of NW¼	40
"	"	17	All of	640
29	12	32	SE¼ of NE¼	40
"	"	"	NW¼ of NW¼	40
"	"	"	SW¼ of NW¼	40
"	"	"	S½ of SE¼	80
"	"	"	NW¼ of SW¼	40
			Forwarded	31,561.71

Twp.	Range	Section	Description	Acres
			Forwarded	31,561.71
29	12	32	S½ of SW¼	80
"	"	33	NE¼	160
"	"	"	NW¼	160
"	"	"	SE¼	160
"	"	"	NE¼ of SW¼	40
"	"	"	S½ of SW¼	80
"	"	34	NE¼	160
"	"	"	NW¼	160
"	"	"	N½ of SE¼	80
"	"	"	SW¼ of SE¼	40
"	"	"	SW¼	160
30	12	1	SW¼ of SW¼	40
"	"	2	S½ of NE¼	80
"	"	"	SW¼ of NW¼	40
"	"	"	S½ of SE¼	80
"	"	"	N½ of SW¼	80
"	"	3	S½ of NE¼	80
"	"	"	N½ of SE¼	80
"	"	"	SW¼ of SE¼	40
"	"	9	S½ of NE¼	80
"	"	"	S½ of NW¼	80
"	"	"	N½ of SE¼	80
"	"	"	SW¼ of SE¼	40
"	"	"	SW¼	160
"	"	10	S½ of NW¼	80
"	"	11	N½ of NE¼	80
"	"	"	NW¼	160
"	"	15	SW¼ of SE¼	40
"	"	"	SW¼	160
"	"	17	S½ of SE¼	80

"	"	"	NW¼ of SW¼	40
"	"	"	S½ of SW¼	80
"	"	18	SW¼ of NE¼	40
"	"	"	SE¼	160
"	"	19	N½ of NE¼	80
"	"	"	SW¼ of NE¼	40
"	"	"	NE¼ of NW¼	40
"	"	"	N½ of SE¼	80
"	"	"	SE¼ of SE¼	40
"	"	"	Lot 4	30.57
"	"	20	NE¼	160
"	"	"	N½ of NW¼	80
"	"	"	SE¼ of NW¼	40
"	"	"	North 30 acres of NE¼ of SE¼	30
"	"	"	NW¼ of SE¼	40
"	"	"	SW¼ of SE¼	40
"	"	"	N½ of SW¼	80
"	"	"	N½ of SE¼ of SW¼	20
"	"	"	SW¼ of SW¼	40
"	"	21	NE¼	160
"	"	"	NW¼	160
"	"	"	SE¼	160
"	"	"	N½ of SW¼	80
"	"	"	SE¼ of SW¼	40
"	"	22	NE¼	160
"	"	"	NW¼	160
"	"	"	NE¼ of SE¼	40
"	"	"	SE¼ of SE¼	40
"	"	23	S½ of NE¼	80
"	"	"	NW¼ of NE¼	40
			Forwarded	36,682.28

Twp.	Range	Section	Description	Acres
			Forwarded	36,682.28
30	12	23	SW½ of NW¼	40
"	"	"	N½ of SE¼	80
"	"	"	SE¼ of SE¼	40
"	"	"	NE¼ of SW¼	40
"	"	"	SE¼ of SW¼	40
"	"	24	NW¼ of SE¼	40
"	"	"	SW¼ of SE¼	40

"	"	"	SW¼	160
"	"	25	NE¼ of NE¼	40
"	"	"	SE¼ of NE¼	40
"	"	"	NE¼ of NW¼	40
"	"	"	SW¼	160
"	"	26	NE¼ of SE¼	40
"	"	"	SE¼ of SE¼	40
30	10	27	NE¼ NE¼, except right of way	39.03
"	"	"	NW¼ NE¼, " "	39.04
"	"	"	S½ of NE¼	80
"	"	"	NE¼, NW¼, " "	39.03
"	"	"	SE¼ of NW¼	40
"	"	"	SW¼ NW¼, except right of way	39.20
"	"	"	N½ of SE¼	80
"	"	"	NW¼ of SW¼	40
"	"	"	S½ of SW¼	80
"	"	28	NW¼ of NE¼	40
"	"	"	SE¼ NE¼, except right of way	39.07
"	"	"	SW¼ of NE¼, " "	39.37
"	"	"	SE¼ of NW¼	40
"	"	"	NE¼ of SE¼	40
"	"	"	SE¼ SE¼, except right of way	38.83
"	"	"	Lot 5	2.15
"	"	"	" 6	7.50
"	"	"	" 7	21.70
"	"	30	SE¼	160
"	"	"	Lot 7	52.50
"	"	"	Lot 8	50.43
"	"	31	NE¼	160
"	"	"	SE¼	160
"	"	"	Lot 1	50.45
"	"	"	" 2	50.54
"	"	"	" 3	50.63
"	"	32	NE¼	160
"	"	"	NW¼	160
"	"	"	SW¼	160
"	"	33	NE¼ NE¼ except right of way	39.35
"	"	"	N½ of NW¼	80
"	"	"	SE¼ of NW¼	40
"	"	"	NW¼ of SE¼	40
"	"	"	S½ of SE¼	80

"	"	"	NE¼ of SW¼	40
"	"	"	Lot 1	22.60
"	"	"	" 2	11.20
"	"	"	" 3	26
"	"	"	" 4	12.50
"	"	"	" 5, except right of way	32.60
"	"	"	" 6	7.40
"	"	"	" 7	33.35
"	"	34	SW¼ of NE¼	40
"	"	"	NE¼ of NW¼	40
"	"	"	NW¼ NW¼, except right of way	39.62
"	"	"	SE¼ of NW¼	40
			Forwarded	40,106.37

Twp.	Range	Section	Description	Acres
			Forwarded	40,106.37
30	10	34	SW¼ NW¼, except right of way	39.20
"	"	"	NW¼ SE¼ " "	39.23
"	"	"	SW¼ of SW¼	40
"	"	"	Lot 1, except right of way	35.89
"	"	"	" 2, " "	8.37
"	"	"	" 3	6.75
"	"	"	" 4, except right of way	34.57
"	"	"	" 6	13.40
"	"	"	" 7	26.80
"	"	"	" 8	25.90
"	"	"	" 9	37
28	14	2	Lot 4	40.80
"	"	23	SE¼ of NE¼	40
"	"	24	SW¼ of NW¼	40
29	11	6	Lot 6	40
"	"	"	" 7	40
"	"	"	" 8	40
"	"	7	NW¼ of NE¼	40
29	12	32	NW¼ of NE¼	40
"	"	"	SW¼ of NE¼	40
"	"	"	SE¼ of NW¼	40
"	"	"	NE¼ of SW¼	40
30	12	34	N½ of SW¼	80
"	"	"	Lot 1	4.60
"	"	"	" 2	30.60

"	"	"	" 9	8.25
"	"	"	" 10	31.50
"	"	"	" 11	21.70
"	"	"	" 13	2.30
"	"	27	SW¼ of SE¼	40
30	11	25	SW¼ of SW¼	40
"	"	"	Lot 4	30
"	"	"	" 5	30.40
"	"	"	" 11	39.17
29	12	28	NW¼ of SE¼	40
"	"	"	S½ of SE¼	80
30	12	19	NE¼ of SW¼	40
				41,372.80

EXHIBIT B

Zone No. 1

Fir	742,993¾ M	
Spruce	238,014 M	
Cedar	10,402¾ M	
White Fir	3,378 M	
Hemlock	236,124¼ M	
Larch	298	
		1,231,210¾ live timber
Dead Cedar	76 M	
Total		1,231,286¾
Cedar Poles	1,861	
Hemlock Poles	105,085	
Fir Poles	2,146	
Spruce Poles	255	
Total		109,347 Poles
Hemlock Ties	201,469	
Fir Ties	1,100	
		202,569 Ties

EXHIBIT C

Zone No. 2

Fir	77,505½ M

Spruce	1,232	M	
Cedar	549	M	
White Fir	256½	M	
Hemlock	58,394¼	M	
Pine	109½	M	
			138,046¾ M live timber
Dead Cedar	6	M	
Total			138,052¾ M
Cedar Poles	80		
Hemlock Poles	45,126		
Fir Poles	36,622		
			81,828 Poles
Hemlock Ties	110,170		
Fir Ties	88,605		
			198,775 Ties

EXHIBIT D

Zone No. 3

Fir	607,984	M	
Spruce	77,519½	M	
Cedar	11,430¼	M	
Larch	40	M	
White Fir	23,518¾	M	
Hemlock	392,321	M	
Pine	22½	M	
			1,112,836 M live timber
Dead Cedar	113	M	
Total			1,112,949 M
Cedar Poles	1,599		
Hemlock Poles	200,073		
Fir Poles	3,237		
Spruce Poles	70		
Total			204,979 Poles

Hemlock Ties	293,945	
Fir Ties	1,575	
Total		295,520 Ties

EXHIBIT E

Zone No. 4

Fir	43,052 M	
Spruce	3,082 M	
Cedar	2,083 M	
White Fir	325 M	
Hemlock	16,197½ M	
		64,739½ M
Hemlock Poles	8,290	
Hemlock Ties	4,775	

EXHIBIT F

Zone No. 5

Fir	2,802 M	
Cedar	121½ M	
Spruce	100 M	
Hemlock	1,028½ M	
		4,052 M
Hemlock Poles	930	
Fir Poles	2,710	
		3,640 Poles
Fir Ties	7,000	

EXHIBIT G

	Timber.	Poles.	Ties.
Zone No. 1	1,231,286¾ M	109,347	202,569
Zone No. 2	138,052¾ M	81,828	198,775
Zone No. 3	1,112,949 M	204,979	295,520
Zone No. 4	64,739½ M	8,290	4,775
Zone No. 5	4,052 M	3,640	7,000
Total	2,551,080 M	408,084	708,639

Indorsed: Bill of Complaint. Filed March 6, 1915.

No. 56

MOTION TO DISMISS PLAINTIFF'S BILL

Come now the defendants in the above entitled

action appearing by Sanford C. Rose, County Attorney for Clallam County, Washington, J. E. Frost, C. F. Riddell and Edwin C. Ewing, attorneys for the defendants, and respectfully move the court for an order dismissing the bill of complaint of plaintiff upon the grounds and for the reasons following:

I

Because the plaintiff at all times mentioned in its said bill of complaint has had a plain, speedy and adequate remedy under the statutes of the state of Washington.

II

Because it fully appears in plaintiff's bill of complaint that the matters and things therein alleged and complained of have long been acquiesced in and consented to by plaintiff, and plaintiff is in equity and good conscience denied from controverting their justice and legality.

III

Because the facts alleged in plaintiff's said bill of complaint are not in violation of any constitutional or statutory provision nor of any rule or principle of justice or equity, but to the contrary are in compliance with both law and equity.

IV

Because the matters and things alleged in plaintiff's said bill of complaint are not sufficient to entitle it to the relief prayed for or to any relief whatsoever or to be heard or to maintain an action.

SANFORD C. ROSE,
J. E. FROST.
C. F. RIDDELL,
EDWIN C. EWING.

Indorsed: Motion to Dismiss. Filed March 29, 1915.

In Equity No. 56

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

This cause coming on to be heard upon the motion of the defendants Clallam County and Herbert H.

Wood, Treasurer of said county, to dismiss the bill of complaint of the plaintiff and the matter having been argued by counsel and submitted to the court said motion to dismiss is overruled and denied.

To which ruling of this court the defendants except and their exception is allowed.

Done in open court this 29th day of March, 1915.

JEREMIAH NETERER, Judge.

Indorsed: Order Denying Motion to Dismiss. Filed March 29, 1915.

In Equity No. 56

ANSWER TO BILL OF COMPLAINT.

To the Honorable Judges of the above entitled Court:

Come now Clallam County, a municipal corporation of the State of Washington, and Herbert H. Wood, Treasurer of said Clallam County, the defendants named in the above entitled action, and for answer to the Bill of Complaint of the plaintiff herein, respectfully submit the following:

I.

With reference to paragraph I of said Bill the defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained, but they are willing to admit the same and not put the plaintiff to proof thereof.

II.

With reference to paragraph II of said Bill the defendants admit the allegations thereof.

III.

With reference to paragraph III of said Bill the defendants admit that the defendant Herbert H. Wood now is and ever since the 11th day of January, 1915, has been the duly elected, qualified and acting Treasurer of Clallam County, Washington, and a resident and inhabitant of said Clallam County.

IV.

With reference to paragraph IV of said Bill the defendants admit the allegations thereof.

V.

With reference to paragraph V of said Bill the defendants admit the allegations thereof.

VI.

With reference to paragraph VI of said Bill the defendants admit that for the purpose of assessment and taxation, and as a basis therefor, the assessing officers of Clallam County have from time to time within the period of five to six years last past, caused timber lands in said county to be cruised and the cruises and estimates thus made to be adopted by the county; that most of the timber lands in the county owned by private parties as distinguished from Government lands, have now been cruised, and that all the lands owned by the plaintiff have been so cruised, and that so far as respects timber lands within the county upon which cruises have thus been made, it is claimed by the assessing officers that the same have been assessed upon the basis of the cruises thus obtained; admit that the assessment made by the assessing officers of the county have been made according to certain zones or districts which the assessing officers have laid off; but deny that said zones or districts have been laid off and determined arbitrarily, unreasonably or unlawfully, or without reference to and in disregard of the true and fair value in money of timber on the lands within such zones or districts, or in any other manner than fairly, truly, impartially, and as the result of the honest and mature deliberation and judgment of the assessing officers of said county formed upon full information after careful inquiry and investigation.

VII.

With reference to paragraph VII of said Bill, the defendants deny that the zone therein referred to was arbitrarily laid off; admit the geographical location of said zone but deny its dimensions and area as alleged in said paragraph; deny that within this zone are included those timber lands which, of all timber lands within the county, are of the greatest value; admit that within this zone the timber is valued for

the year 1914 by the assessing officers of Clallam County, at the figures set forth in said paragraph; admit that in this and in all other zones in addition to the value placed by the assessing officers on the timber, there was for the year 1914 placed upon the lands themselves a valuation of One Dollar ($1.00) per acre; deny that the same in the case of the plaintiff's lands or any other persons, was done arbitrarily, unreasonably and unlawfully or without any reference to the actual value thereof, or in any other manner than fairly, truly, impartially and according to law; and deny that many or any of the lands of the plaintiff are of no value whatsoever independent of the timber standing or being thereon.

VIII.

With reference to paragraph VIII of said bill, the defendants deny that the zone therein referred to was arbitrarily, unreasonably and unlawfully set off by the assessing officers; admit that it lies in the Western part of Clallam County; deny that no part thereof lies nearer to the Straits than approximately four to six miles and that no lands within this zone owned by the plaintiff lie nearer to the Straits than approximately nine mills, and that the great body of the lands owned by the plaintiff within this zone lie much more distant therefrom; admit the form and extent of said zone as alleged in said paragraph; deny that there are no harbors upon the Pacific Ocean within the counties of Clallam or Jefferson at or through which the timber on the lands of the plaintiff might or could be brought to market; admit that within this zone there is a large acreage of land and that upon the timber lands within this zone the assessing officers of Clallam County put for the year 1914, for the purposes of taxation, the valuations therein set forth; admit that the plaintiff is the owner of lands and timber to the extent and in the amounts of the figures therein set forth, and that the value of the lands of the plaintiff within this zone, as fixed and determined by the assessing officers of Clallam County for the

year 1914 for the purposes of taxation is as stated therein; deny that all the lands owned by the plaintiff within this zone or the other zones or distircts set off by said assessing officers are separated from the Straits of Fuca by a range of mountains.

IX.

With reference to paragraph IX of said bill, the defendants deny that the zone therein referred to was arbitrarily, unreasonably and unlawfully set off by the assessing officers; admit the location and extent of the zone as therein set forth; admit that upon the timber lands within this zone or district the assessing officers of Clallam County put, for the year 1914 for the purposes of taxation, the valuations therein set forth; admit that the plaintiff is the owner of lands and timber to the extent and in the quantities therein set forth, and that the value of the lands of the plaintiff as fixed and determined by the assessing officers of Clallam County for the year 1914 for the purposes of taxation is as stated therein; deny that none of the lands of the plaintiffs within this zone lie nearer to the Straits than six miles, and deny that between these lands and the Straits there is a high and practically impassable mountain range as therein stated.

X.

With reference to paragraph X of said bill, the defendants deny that the zone therein referred to was arbitrarily, unreasonably and unlawfully set off by the assessing officers; admit the location and extent of the zone as therein set forth; admit that upon the timber lands within this zone or district the assessing officers of Clallam County put, for the year 1914 for the purposes of taxation, the valuations therein set forth; admit that the plaintiff is the owner of lands and timber to the extent and in the quantities therein set forth, and that the value of the lands of the plaintiff as fixed and determined by the assessing officers of Clallam County for the year 1914 for the purposes of taxation is as stated therein; deny that none of the lands of the plaintiff within this zone lie nearer to

the straits than eight miles, and that some of the lands owned by the plaintiff in this zone are twenty-one miles distant therefrom, and admit the extent of the lands owned by the plaintiff as therein stated.

XI.

With reference to paragraph XI of said bill, the defendants deny that the zone therein referred to was arbitrarily, unreasonably and unlawfully set off by the assessing officers; admit the geographical location of said zone; deny that a range of mountains separates the Sol Duc valley and the lands of the plaintiff from the Straits; deny that this zone is composed of rough and mountainous lands and that there is comparatively a considerable quantity of burnt timber within the same; admit that upon the timber lands within this zone or district the assessing officers of Clallam County put, for the year 1914, for the purposes of taxation, the valuations therein set forth; admit that the plaintiff is the owner of lands and timber to the extent and in the quantities therein set forth, and that the value of the lands of the plaintiff as fixed and determined by the assessing officers is as stated therein; deny that none of the lands of the plaintiff within this zone lie nearer to the Straits than eight miles.

XII.

With reference to paragraph XII of said bill, the defendants deny that the zone therein referred to was arbitrarily, unreasonably or unlawfully set off by the assessing officers; admit the geographical location and extent of the zone therein referred to, and that said zone contains only a small acreage of land owned by private parties, bordering upon the unsurveyed Government lands situate in the forest reserve; admit that upon the timber lands within this zone or district the assessing officers of Clallam County put, for the year 1914, for the purposes of taxation, the valuations therein set forth; admit that the plaintiff is the owner of lands and timber to the extent and in the quantities therein set forth, and that the value of the lands of the plaintiff as fixed and determined by the assessing officers is as stated therein; deny that none of the

lands of the plaintiff within this zone lie nearer to the Straits than nine miles.

XIII.

With reference to paragraph XIII of said bill the defendants admit the assessment of poles and ties upon the basis therein set forth.

XIV.

With reference to paragraph XIV of said bill, the defendants deny the practice by assessors and taxing boards of the custom therein referred to, and deny the pursuit of such custom by county assessors and its recognition and acquiescence by the State Board of Equalization; deny that the assessor of Clallam County gives out and pretends that for the year 1914 he assessed taxable property within Clallam County upon the basis of fifty per cent of its true and fair value in money, or upon any other or different basis than that provided by the laws of the State of Washington at the time the assessments for the year 1914 were made; deny that the members of the County Board of Equalization give out and pretend that they equalized and approved the assessments upon the taxable property within said county upon the basis alleged in said paragraph, or upon any other or different basis than that provided by the laws of the State of Washington at the time the assessment for the year 1914 was made; admit that the interior timber lands in said County, including the lands owned by the plaintiff were and are valued in the year 1914 for the purpose of taxation at sums in excess of fifty per cent of the true and fair value thereof in money; deny that other properties in said county, real and personal, were valued at sums less than fifty per cent of the true and fair value thereof in money; (deny) that the plaintiff was discriminated against grossly and intentionally or at all, by the assessing officers of Clallam County in the matter of assessment and taxation of its lands for the year 1914.

XV.

With reference to paragraph XV of said bill, the defendants admit that the timber upon the lands of

the plaintiff, as shown by the cruise made by the County of Clallam, amount in the aggregate to the figures set forth therein, and that the assessments upon said lands for the year 1914 were made upon the basis of said cruise; deny that the timber on the lands of the plaintiff was over-valued greatly or at all by the assessing officers of said County, in the valuations put thereon by them for the purposes of taxation in the year 1914; admit that the valuations placed by the assessing officers of said county upon the lands of the plaintiff for the purpose of taxation for the year 1914 amount to the figures therein set forth; deny that the true and fair value in money of said lands does not exceed the sum of $2,050,000, and did not exceed that sum in the year 1914; deny that said assessment for the year 1914 was made upon the basis of 84% or upon any other or different basis than the true and fair value in money of all the property assessed; deny that no property in said Clallam County save the timber lands owned by the plaintiff and certain other timber lands similarly situated was assessed in said year 1914 at so great a proportion of its true and fair value in money; deny that the assessment upon the lands of the plaintiff or upon any other lands or other property in said county, was in pursuance of any combination and conspiracy between the assessor of Clallam County and the other members of the County Board of Equalization of said county as alleged in said paragraph or at all.

XVI.

With reference to paragraph XVI of said bill, the defendants admit the allegations thereof.

XVII.

With reference to paragraph XVII of said bill, the defendants admit the election of the assessing officers of Clallam County as alleged in said paragraph; deny that the assessing officers of said county have combined and concerted together, wrongfully and corruptly, with the intents and purposes alleged, or for any other intent and purpose, or at all; admit that it has been the custom of the assessor of said county

to consult and advise with the other members of the County Board of Equalization of said county, and with residents of the Middle and West and East districts of said county in making his assessment rolls, and that such custom was followed in making his assessment rolls for the year 1912, 1913 and 1914, but deny that such custom is or was in pursuance of a combination and conspiracy as alleged in said paragraph or at all; deny that the assessment roll does not and did not in the years stated represent the judgment of the assessor and deny that said roll was and is the result of any combination and conspiracy with the other members of the County Board of Equalization; deny that the assessment roll is approved as a matter of course as relates to assessments on timber lands or otherwise by the County Board of Equalization; deny that no fair hearing is possible to be had on appeal to said Board; deny that the custom alleged in said paragraph or any similar or unlawful custom has been followed in said county for several years continuously past, or at all; and deny that the plaintiff was refused a hearing upon appeal to said Board in 1910, as alleged in said paragraph, or at all, or that the conversation between attorney for the plaintiff and the members of said Board took place at said time or at all.

XVIII.

With reference to paragraph XVIII of said bill, the defendants deny that at the times therein stated or at any other times, for the reasons or with the intent and purpose therein alleged, or for any other purpose whatsoever, were gross or any discriminations practiced by the assessing officers of said Clallam County against the plaintiff or any other persons, or in favor of any other persons, as alleged in said paragraph, or at all.

XIX.

With reference to paragraph XIX of said bill, the defendants allege that they are without knowledge or information as to the examination of the assessment rolls of said county by the plaintiff, and the result thereof, and they therefore deny the allegations of said para-

graph with regard thereto; deny that the lands and other properties situated at Port Angeles and subject to taxation are valued upon said assessment rolls as equalized for such years at not to exceed ten to twenty per cent of their true and fair value in money; admit the composition of the County Board of Equalization of Clallam County and the residence of the constituent members thereof as therein alleged, and that the major portion of the population of said county is at Port Angeles; deny that for the purposes therein alleged, or for any other purpose, did the three members of said Board resident at Port Angeles, combine and conspire with the Commissioner from the East District, or any other person, against the plaintiff and other owners of timber lands in the interior of said county, as therein alleged, or against any other persons, or at all.

XX.

With reference to paragraph XX of said bill, the defendants allege that they are without knowledge or information as to the examination by the plaintiff of the assessment rolls of Clallam County for the years 1912, 1913 and 1914 and of property values within said county, and the results thereof, and they therefore deny the allegations of said paragraph with regard thereto; and deny that the farming lands and other properties situate in the East end and subject to taxation are valued upon said tax rolls as equalized for such years at not to exceed 25% to 30% of their true and fair value in money.

XXI.

With reference to paragraph XXI of said bill, the defendants allege that they are without knowledge or information as to the examination by the plaintiff of the assessment rolls of Clallam County for the years 1912, 1913 and 1914 and of property values within said county, and the results thereof, and they therefore deny the allegations of said paragraph with regard thereto; and deny that the personal property within said county described in said paragraph was valued by the assessing officers of said county for the year

1914 at not to exceed 10% to 15% of its true and fair value in money.

XXII.

With reference to paragraph XXII of said bill, the defendants admit the location of the lands of the plaintiff as therein stated; deny that said lands are wholly destitute of facilities for transportation, and that it is impossible to bring the timber therefrom into market or that it is necessary that facilities be provided for transportation to Gray's Harbor on the South or the Straits of Fuca on the North; admit that Gray's Harbor is far distant and that no railroad extends further north from that direction than Moclips, and that Moclips is sixty miles from the plaintiff's lands; deny that the lands of the plaintiff are as distant from the Straits of Fuca as therein stated or that said lands are cut off from the straits by a range of mountains or that it is impossible to bring the timber from said lands except by transportation across such range of mountains; deny that such transportation is impossible of accomplishment except by the construction of a railroad at great expense, or that such expense is beyond the present means at the command of the plaintiff or which is prohibitive under the present condition of the lumber market or conditions which have at any time heretofore prevailed, or that the facts alleged in said paragraph have a direct and important bearing upon the present value of the lands of the plaintiff; admit that upon the Straits of Fuca and immediately adjoining tide water, there lie fine bodies of fir, spruce, cedar and hemlock timber, which can readily be logged to the Straits as stated, and that extensive logging operations now are and for many years have been carried on in that portion of said Clallam County; admit that this Straits timber (so-called) is in the zone or district described in paragraph VII of said bill, but deny that said zone was arbitrarily unreasonably and unlawfully laid off by the assessing officers of said county; admit that in the zones described in said paragraphs VII and XXII the valuations put upon the timber are as stated in said para-

graph XXII; and deny that the true and fair value in money of the so-called Straits timber is at least twice the true and fair value in money of the timber on plaintiff's lands.

XXIII.

With reference to paragraph XXIII of said bill, the defendants admit the geographical location of Port Angeles as therein stated, and the desires and ambitions of the inhabitants thereof; deny the statements therein imputed to inhabitants of Port Angeles and the assessor; deny the combination and conspiracy therein alleged or any combination and conspiracy; deny the purpose therein imputed to the assessing officers of said county, and the assurances of influential citizens of Port Angeles therein set forth; deny the ownership of real property in Port Angeles by the majority of the members of the Board of Equalization, and the personal interest and desire for aggrandizement of the members of said Board for the purposes therein imputed or for any other purpose incompatible with their official positions and duties.

XXIV.

With reference to paragraph XXIV of said bill, the defendants deny that the assessments therein complained of are unequal, discriminating or unlawful, or that they are the result, direct and immediate or otherwise, of any intent, either corrupt or unlawful or in any wise incompatible with the official positions and duties of said officers, of the County Assessor and the members of the County Board of Equalization of said Clallam County, to discriminate against the plaintiff or any other persons, or in favor of any persons, either as stated in said paragraph or otherwise, or to undervalue or overvalue the taxable properties in said county for the purposes therein alleged or for any other purposes whatsoever.

XXV.

With reference to paragraph XXV of said bill the defendants admit the provisions of section 9112 of volume 3 of Remington & Ballinger's Annotaeed Codes and Statues of Washington herein referred to;

but deny that said statute is constitutional and deny that said statute is the law; deny that the true and fair value in money of the lands of the plaintiff therein referred to do not exceed, and did not exceed when the assessments for 1912, 1913 and 1914 were made, the sum therein stated; deny that under said statute any assessments of lands of the plaintiff for purposes of taxation at a sum greater than the sum of $1,025,000 is unjust, illegal and void; admit that the true and fair value in money of the lands owned by the plaintiff is known to the assessor of Clallam County and to the members of said County Board of Equilization, and was so known at the time of the making of said assessment and the approval thereof by said Board; deny that said officers in making and equalizing such assessment disregarded the duty placed upon them by law, and deny that said officers fraudulently and unlawfully caused said lands to be assessed at a sum exceeding by $700,015.00 the 50 per cent of the true and fair value in money of said lands; deny that the assessment of said lands was made and approved by said officers with a fraudulent or corrupt intent, or with any other intent incompatible with their official positions and duties, either as stated in said para graph or otherwise; admit that the taxes levied for the year 1914 upon the lands of the plaintiff aggregate the sum therein stated, but deny that had said taxes been levied upon the true and fair value in money of said lands, the same would not have exceeded the sum of $25,466; deny that the practices of the assessing officers of said county in the matter of the assessment of the lands of the plaintiff for the year 1914, or any other year, were fraudulent or unlawful, or in any wise incompatible with the duties of said officers, or that there are or were imposed upon the lands of the plaintiff for said year taxes to the amount of $17,494.78 in excess of all taxes which might or could equitably or lawfully be imposed thereon, and deny that the taxes in any amount for said year have been imposed upon said lands in excess of all taxes which might or could equitably or lawfully be imposed thereon.

XXVI.

With reference to paragraph XXVI of said bill, the defendants deny either an overvaluation of the lands therein referred to, or the undervaluation of other property in said county and the pursuit and practice of the policy therein imputed to the assessing officers of said county, or any other policy incompatible with their official duties, for several years last past, or at all; deny that the assessment of the lands of the plaintiff and other owners of timber lands in the interior of said county are proportionately higher than the assessments imposed upon other real and personal properties in said county, or that said assessments are or result in an actual or any fraud upon the plaintiff; deny that any plan resulting in fraud upon the plaintiff or any other person is or was arbitrarily and systematically or otherwise adopted and carried out by the officers therein referred to or by the defendants herein.

XXVII.

With reference to paragraph XXVII of said bill, the defendants deny that the assessments upon the lands of the plaintiff were made by the assessor of said county for the year 1912 at a high, excessive, unlawful and illegal rate as specified in said bill, and upon the unlawful and fraudulent basis therein mentioned; admit that thereafter the County Board of Equalization met to consider and review the assessment roll; deny that such review was ostensible, specious and fraudulent in character; deny that the members of said Board had combined and conspired with the assessor as therein stated, or at all; admit the appearance and protest of the plaintiff before said board at its regular sitting in 1912 as therein stated; admit that the protests of the plaintiff were overruled by the board, but deny that the same were arbitrarily disregarded or that the petition of the plaintiff to equalize its assessment was arbitrarily denied.

XXVIII.

With reference to paragraph XXVIII of said bill, the defendants deny that the assessments upon the lands of the plaintiff were made by the assessor of said county

for the year 1913 at a high, excessive, unlawful and illegal rate as specified in said bill, and upon the unlawful and fraudulent basis therein mentioned; admit that thereafter the County Board of Equalization met to consider and review the assessment roll; deny that such review was ostensible, specious and fraudulent in character; deny that the members of said Board of Equalization had combined and conspired with the assessor as therein stated, or at all; admit the appearance and protest of the plaintiff before said Board at its regular sitting in 1913 as therein stated; admit that the protests of the plaintiff were overruled by the Board but deny that the same was arbitrarily disregarded or that the petition of the plaintiff to equalize its assessment was arbitrarily denied.

XXIX.

With reference to paragraph XXIX of said bill the defendants deny that the assessments upon the lands of the plaintiff were made by the assessor of said county for the year 1914 at a high, excessive, unlawful or illegal rate as specified in said bill, or upon an unlawful or fraudulent basis therein mentioned; admit that thereafter the County Board of Equalization met to consider and review the assessment roll; deny that such review was ostensible, specious and fraudulent in character; deny that the said members of the Board of Equalization had combined or conspired with the assessor as therein stated, or at all; admit the appearance and protest of the plaintiff before said board at its regular sitting in 1914 as therein stated; admit that the protests of the plaintiff were overruled by the Board but deny that the same was arbitrarily disregarded or that the petition of the plaintiff to equalize its assessment was arbitrarily denied.

XXX.

With reference to paragraph XXX of said bill, the defendants admit the extension of the taxes and the delivery of the tax rolls to the Treasurer of Clallam County, but deny that the basis of such extension and such assessment was high, excessive, unlawful and fraudulent as alleged therein; admit that said

Treasurer had demanded payment of such taxes as shown by said rolls, but deny that said taxes are illegal, fraudulent or arbitrary; admit that the taxes so demanded by said Treasurer amount in the aggregate to said sum of $42,960.75, and that said Treasurer, unless restrained by order of this court, will sell the property of the plaintiff to satisfy such taxes.

XXXI.

With reference to paragraph XXXI of said bill the defendants admit the allegations thereof.

XXXII.

With reference to paragraph XXXII of said bill, the defendants admit the duties of the Treasurer of Clallam County with reference to the disposition of taxes collected as stated therein; deny that if the plaintiff instituted suit to recover back taxes paid as allowed in said paragraph, it would be obliged to bring suit against each one of the taxing bodies therein mentioned, and deny that thereby there would be necessitated a multiplicity of suits, and deny that the proportion of the tax going to the State of Washington could not be collected back, or that repayment from the town of Port Angeles would not cover costs and other items referred to therein, or that plaintiff would thereby be subjected to great and irreparable injury or that plaintiff would not have a complete, adequate or any remedy at law; admit the duties of the Treasurer of Clallam County with reference to the issuance of certificates of delinquency as therein alleged; and deny that the levy and existence of the tax therein referred to constitute a cloud upon the title to the plaintiff's lands or any of them.

XXXIII.

With reference to paragraph XXXIII of said bill the defendants admit the tender of the amount therein stated, and that the said Herbert H. Wood, as Treasurer of said Clallam County, has refused to accept said tender as payment in full of the taxes upon the lands of the plaintiff for the year 1914; deny that the sum thus tendered is more than the

taxes justly and equitably due from the plaintiff as therein alleged; deny that the plaintiff's property was assessed upon any different basis than all the other property within said county or that said assessments were other than legal and equitable, equal to and uniform with the assessments upon all other property within said county; deny that the taxes upon the lands of the plaintiff for all years prior to 1914 have been paid and discharged and deny that the taxes for the year 1914 have been paid and discharged by the tender and payment as specified in said paragraph.

XXXIV.

With reference to paragraph XXXIV of said bill, the defendants deny that the assessment of the lands of the plaintiff for the year 1914 is arbitrary, unjust, illegal or fraudulent as compared with the assessment of all other property in said Clallam County or otherwise, or that said assessment as made by the assessing officers of said county is prohibited by the Constitution of the State of Washington or is in violation of Sections 1 and 2, Article VII thereof as therein alleged, or that the taxes upon the lands of the plaintiff are not equal and uniform as compared with all other property in said county.

XXXV.

With reference to paragraph XXXV of said bill, the defendants deny that if the assessment and levy of taxes upon the plaintiff's lands for the year 1914 be not vacated, set aside and held for naught, the same will result in the taking of the property of the plaintiff without due process of law or in denying to the plaintiff the equal protection of the laws, or that the same would be a violation of the Fourteenth Amendment to the Constitution of the United States; but admit the jurisdiction of this Honorable Court.

XXXVI.

With reference to paragraph XXXVI of said bill, the defendants deny that the plaintiff is remediless at common law or that he is relievable only in a court of equity as therein alleged.

FIRST AFFIRMATIVE DEFENSE.

And for a first further and affirmative defense to the cause of action set forth in the plaintiff's bill of complaint herein, the defendants allege:

I.

That the true and fair value in money of timber and timbered lands is dependent, among other factors, upon the character and quality or grade of timber, the thickness of the stand of timber or quantity per acre or upon a given tract, the topography of the ground upon which the timber stands, the presence of water for use in camps, logging engines and locomotives, the probability of fires, the size and contiguity of the tracts of land, large tracts or contiguous tracts constituting practically solid bodies of land containing sufficiently large quantities of timber to constitute profitable logging enterprises being commercially more valuable per acre or per M. feet of timber than smaller or isolated tracts not sufficient in size to warrant the construction of roads, railroads, camps and other facilities necessary to the removal of the timber.

The lands of the plaintiff, referred to in its bill of complaint herein, consist of large and practically solid bodies, bearing timber of valuable character, of exceptionally high grade and quality and of thick and heavy stand, and constitute desirable advantageous and profitable logging enterprises from an operating standpoint, making the same proportionately more valuable than smaller or isolated tracts of timbered lands in the same localities, or otherwise similar in character to the lands of the plaintiff.

II.

That on or about the year 1908, the assessing officers of Clallam County caused to be employed experienced, capable and competent timber cruisers to make, and who did make, full, complete and detailed cruises and estimates of the character, quality and quantity of the timber standing upon the various legal subdivisions of land in said county. All of the timbered lands in said county in private owner-

ship including the lands of the plaintiff, have now been so cruised and platted into tracts or zones, and detailed reports and estimates of such cruises made and filed in the office of the County Assessor of said county respecting the same. These reports, estimates and plats, taking into due consideration the factors of value hereinabove set forth, and also the availability, ease or difficulty of logging, and physical characteristics of the lands, together with such other information with reference to agricultural possibilities of the lands, the presence of mineral deposits and other similar factors of value as the assessing officers were able to obtain upon independent investigation, were, and have been consulted and used by such officers to assist in ascertaining and determining the values of said lands for the purposes of assessment and taxation, and such facts, plats, estimates, reports, data and other information, with due attention to geographical location, availability, physical characteristics of the ground, and other elements influencing the values of timber and timbered lands, as hereinabove set forth, were carefully considered by such officers in making the assessments referred to in the plaintiff's bill of complaint herein.

The assessments thus made, and as hereinafter referred to, were not arbitrary, capricious, unlawful, unreasonable, inequitable, disproportionate, or the result of any combination or conspiracy whatsoever, as alleged in the plaintiff's bill of complaint herein, or at all, but were the results of the honest, sincere, conscientious, mature and deliberate judgment and belief of the assessing and equalizing officers of said county formed upon and after full and careful investigation of all the facts and circumstances surrounding said lands and affecting their values, as hereinabove set forth, and a full, free and fair hearing as required by law.

III.

That by the laws of the State of Washington in force and effect at the time the assessments for the years 1912, 1913 and 1914 complained of in plain-

tiff's said bill of complaint were made, and prior thereto, as hereinafter set forth, it was and is provided:

(Laws of 1897, Chapted LXXI.)

Sec. 1. That all real and personal property now existing, or that shall be hereafter created or brought into this state shall be subject to assessment and taxation upon equalized valuations thereof, fixed with reference thereto on the first day of March at twelve o'clock meridian in each and every year in which the same shall be levied, and

Sec. 2. That real property for the purposes of taxation shall be construed to be the land itself, and all buildings, structures and improvements, or other fixtures of whatsoever kind thereon, and all rights and privileges thereto belonging or in any wise appertaining, and all quarries and fossils in and under the same, which the law defines, or the courts may interpret, declare and hold to be real property, for the purposes of taxation, and

Sec. 6. That all real property in this state subject to taxation shall be listed and assessed under the provisions of this act in the year 1910 and biennially thereafter on every even numbered year with reference to its value on the first day of March preceding the assessment, and that all real estate subject to taxation shall be listed by the assessor each year in the detailed and assessment list and in each odd numbered year the valuation of each tract for taxation shall be the same as the valuation thereof as equalized by the County Board of Equalization in the preceding year, and

Sec. 42. That all property shall be assessed at its true and fair value in money; that the assessor shall value each article or description of property by itself, and at such sum or price as he believes the same to be fairly worth in money at the time such assessment is made; that in assessing any tract or lot of real property, the value of the land, exclusive of improvements shall be determined; in valuing any property on which there is a coal or other mine, or stone or

other quarry, the same shall be valued at such price as such property, including the mine or quarry, would sell at a fair voluntary sale for cash.

IV.

That the assessments of the lands of the plaintiff, described in its said bill of complaint, based upon the cruises of timbered lands in said county, as herein set forth, began and were made in the year 1910, and were used and consulted and adopted in 1911 and 1912, and have continued ever since; that the plaintiff, as alleged in its said bill of complaint herein, paid without protest, all of the taxes levied upon its said lands for the years 1910, 1911 and 1912.

V.

That the methods and bases upon which, and the laws of the State of Washington under which, the assessments of timbered lands in Clallam County, including the lands of the plaintiff, have been made since the year 1910, have at all times since that date, been known to and acquiesced in by the plaintiff.

VI.

That under the laws of the State of Washington, all taxes for State, County, Municipal and other purposes, are levied in specific sums and charged directly to the respective counties of said state; the rate per centum necessary to raise the taxes so levied in dollars and cents is computed and ascertained by the County Assessor of each county; that after taxes are thus levied, neither the county nor the property therein can be relieved of the duty of the payment of such taxes; that deficiencies owing to a reduction in the amount of taxes to be paid by any property owner or taxpayer, or to a failure to collect taxes for any reason, are by the laws of said State, required to be added to, made up and collected under future assessments and levies, all of which is known to the plaintiff.

That the lands of the plaintiff, as admitted by the allegations of its bill of complaint herein, are not assessed or taxed at any greater or higher value

or rate than other timbered lands in said county of similar character or similarly situated to the lands of the plaintiff, and upon which the taxes and assessments have been paid by the owners thereof.

That under the laws of the State of Washington, county boards and officials are prohibited from and are without authority to remit or grant refunds of taxes paid, all of which is known to the plaintiff herein; that plaintiff neglected and delayed to take proper or any steps or to bring any suit or other proceeding to correct the alleged inequitable assessments referred to in its said bill of complaint herein, until after the larger portion of the taxes levied upon other lands similar in character and similarly located to the lands of the plaintiff had been paid, and if relief as prayed for in the plaintiff's said bill of complaint is granted, other owners of property similar in character and similarly situated to the lands of the plaintiff in said county, will have been for the year 1914, and in the future will be, compelled to pay an unjust and unfair proportion of the taxes levied upon property in said county.

VII.

That by reason of the premises, and the facts and circumstances hereinabove recited, the plaintiff has been and is guilty of laches, and is precluded and estopped to question or deny the legality, fairness or correctness of the assessment and levy of taxes upon its said lands for the year 1914, and it cannot, in equity or good conscience, now be heard to complain thereof.

SECOND AFFIRMATIVE ANSWER.

And for a second and further affirmative defense to the cause of action set forth in the plaintiff's bill of complaint herein, the defendants allege:

I.

That they hereby refer to paragraphs I, II, III and IV of their first and further affirmative defense hereinabove set forth, and by such reference adopt the same and make them a part of this second affirmative defense.

II.

That Section 9112 of Volume 3 of Remington & Ballinger's Annotated Codes and Statutes of Washington is unconstitutional, inoperative and void.

WHEREFORE, having fully answered the said bill of complaint herein, the defendants pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained, and for such other and further relief as to the Court shall seem meet, just and equitable.

CLALLAM COUNTY.
HERBERT H. WOOD, as Treasurer of said County,
Defendants.

SANFORD C. ROSE,
J. E. FROST,
C. F. RIDDELL,
EDWIN C. EWING,
Attorneys for Defendants.
Offices and Post Office Address:
627 Colman Bldg.,
Seattle, Wash.

Indorsed: Answer to Bill of Complaint. Filed May 3, 1915.

STIPULATION AS TO CONTENTS OF AMENDED PEADINGS

IT IS STIPULATED by and between the plaintiff, appellant and the defendants, appellees herein, at the instance and request of the plaintiff, in order to save unnecessary expense of useless repetition in making up the record for appeal herein, as follows: to-wit:

That after the close of the evidence and at the time of argument of this cause the defendants, over the objection of the plaintiff, under circumstances set forth in the statement of facts herein, were allowed to amend their answer in certain particulars, as defendants contended, to correspond to the evidence in the case, and thereafter, on to-wit the 2nd day of February, 1915, defendants served upon the plaintiff and filed herein their amended answer, with reference to which

it is here and now stipulated that said amended answer is the same in all respects as the answer filed on the 3d day of May, 1915, save only in the following respects, to-wit:

(A) Paragraph XIV was amended to read as follows, to-wit:

"With reference to paragraph XIV of said bill, the defendants admit the practice by assessors and taxing bodies of the custom therein referred to and admit the pursuit of such custom by county assessors and its recognition and acquiescence by the State Board of Equalization; deny that the assessor of Clallam County gives out and pretends that for the year 1914 he assessed taxable property within Clallam County upon the basis of fifty per cent of its true and fair value in money; deny that the members of the County Board of Equalization give out and pretend that they equalized and approved the assessments upon the taxable property within said county upon the basis alleged in said paragraph; deny that the interior timber lands in said county, including the lands owned by the plaintiff were and are valued in the year 1914 for the purpose of taxation at sums in excess of fifty per cent of the true and fair value thereof in money; deny that other properties in said county, real and personal, were valued at sums less than fifty per cent of the true and fair value thereof in money; that the plaintiff was discriminated against grossly and intentionally or at all, by the assessing officers of Clallam County in the matter of assessment and taxation of its lands for the year 1914."

(B) Paragraph XV was amended to read as follows:

"With reference to paragraph XV of said bill, the defendants admit that the timber upon the lands of the plaintiff as shown by the cruise made by the County of Clallam, amount in the aggregate to approximately 2,551,080,000 feet, the figures set forth therein, and that the assessments upon said lands for the year 1914 were made upon the basis of said cruise; deny that the timber on the lands of the plain-

tiff was overvalued greatly or at all by the assessing officers of said county, in the valuations put thereon by them for the purposes of taxation in the year 1914; admit that the valuations placed by the assessing officers of said county upon the lands of the plaintiff for the purpose of taxation for the year 1914 amount to the figures therein set forth, to-wit: $1,725,015; deny that the true and fair value in money of said lands does not exceed the sum of $2,050,000 and did not exceed that sum in the year 1914; deny that said assessment for the year 1914 was made upon the basis of 84 per cent, that no property in said Clallam County save the timber lands owned by the plaintiff and certain other timber lands similarly situated was assessed in said year 1914 at so great a proportion of its true and fair value in money; deny that the assessment upon the lands of the plaintiff or upon any other lands or property in said county, was in pursuance of any combination and conspiracy between the assessor of Clallam County and the other members of the County Board of Equalization of said county as alleged in said paragraph, or at all."

(C) Paragraph XVII was amended in the following respect:

In the original answer defendants had admitted that "it has been the custom of the assessor of Clallam County to consult and advise with the other members of the County Board of Equalization of said county, and with residents of the Middle, and West and East Districts of said county in making his assessment rolls, and that such custom was followed in making his assessment rolls for the years 1912, 1913 and 1914," whereas in the amended answer they deny the existence of this custom.

(D) Paragraph XXII was amended in the following respect:

In the original answer, paragraph XXII thereof, the defendants had admitted the charge in plaintiff's complaint "that upon the Straits of Fuca and immediately adjoining tide water, there lie fine bodies of fir, spruce, cedar and hemlock timber which can readily

be logged to the Straits as stated," whereas in their amended answer, in paragraph XXII, they deny that this Straits timber can be readily logged to the Straits.

(E) Paragraph XXV was amended to read as follows:

"With reference to paragraph XXV of said bill the defendants admit the provisions of section 9112 of volume 3 of Remington & Ballinger's Annotated Codes and Statutes of Washington therein referred to; deny that the true and fair value in money of the lands of the plaintiff therein referred to do not exceed, and did not exceed when the assessments for 1912, 1913 and 1914 were made, the sum of $2,050,000 therein stated; deny that under said statute any assessment of lands of the plaintiff for purposes of taxation at a sum greater than the sum of $1,025,000 is unjust, illegal and void; admit that the true and fair value in money of the lands owned by the plaintiff is known to the assessor of Clallam County and to the members of said County Board of Equalization, and was so known at the time of the making of said assessment and the approval thereof by said Board; deny that said officers in making and equalizing such assessment disregarded the duty placed upon them by law, and deny that said officers fraudulently and unlawfully caused said lands to be assessed at a sum exceeding by $700,015.00 the 50 per cent of the true and fair value in money of said lands; deny that the assessment of said lands was made and approved by said officers with a fraudulent or corrupt intent or with any other intent incompatible with their official position and duties, either as stated in said paragraph or otherwise; admit that the taxes levied for the year 1914 upon the lands of the plaintiff aggregate the sum of $42,960.75 therein stated, but deny that had said taxes been levied upon the true and fair value in money of said lands, the same would not have exceeded the sum of $25,466.00; deny that the practice of the assessing officers of said county in the matter of the assessment of the lands of the plaintiff for the year 1914 were fraudulent or unlawful, or

in any wise incompatible with the duties of said officers, or that there are or were imposed upon the lands of the plaintiff for said year taxes to the amount of $17,494.78 in excess of all taxes which might or could equitably or lawfully be imposed thereon, and deny that the taxes in any amount for said year have been imposed upon said lands in excess of all taxes which might or could equitably or lawfully be imposed thereon."

(F) There is omitted from the amended answer the following matter pleaded in the original answer by the defendants as a Second Affirmative Defense:

"1. That they hereby refer to paragraphs I, II, III, IV of their first and further affirmative defense hereinabove set forth, and by such reference adopt the same and make them a part of this second affirmative defense.

II.

"That Section 9112 of Volume 3 of Remington & Ballinger's Annotated Codes and Statutes of Washington is unconstitutional, inoperative and void."

And with this explanation IT IS STIPULATED that defendants' amended answer need not be set out in this transcript on appeal.

EARLE & STEINERT,
PETERS & POWELL,
Attorneys for Plaintiff.
EDWIN C. EWING,
C. F. RIDDELL,
Attorneys for Defendants.

Indorsed: Stipulation Regarding Transcript of Pleadings in Record on Appeal. Filed Nov. 6, 1916.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No.....

CLALLAM LUMBER COMPANY,
a corporation,
Appellant,
vs.
CLALLAM COUNTY, a municipal

corporation, and HERBERT H. WOOD, Treasurer,

Appellees.

ORDER UPON STIPULATION AS TO RECORD OF TESTIMONY ON APPEAL.

It appearing from the stipulation of appellants and appellees, by their respective counsel, herein filed, that, in the District Court of the United States for the Western District of Washington, Northern Division, there were herein pending, heard and determined four causes, being designated as follows: Clallam Lumber Company, a corporaion, plaintiff v. Clallam County a municipal corporation, and Clifford L. Babcock, treasurer, being Equity cause No. 36, and the cause of Clallam Lumber Company, plaintiff, v. Clallam County and Herbert H. Wood, treasurer, being Equity cause No. 56; and the cause of Charles H. Ruddock and Timothy H. McCarty, plaintiffs v. Clallam County, a municipal corporation, and Clifford L. Babcock, treasurer, being Equity cause No. 37; and the cause wherein Charles H. Ruddock and Timothy H. McCarty, are plaintiffs and Clallam County, a municipal corporation, and Herbert H. Wood, treasurer, are defendants, being Equity cause No. 57; that said four causes were consolidated for trial and were heard, tried and determined by one and the same judge upon the same testimony, evidence and exhibits, and that there was no other or different evidence in the one case than in the other; and it appearing that there was but one and the same decision of the trial judge handed down in the four cases, and that the plaintiffs in the above four cases are seeking to appeal from the judgment or decree rendered and entered in each of said causes to this honorable court; and it appearing that the transcript of the testimony and evidence in these cases is quite voluminous, covering some 700 pages of printed matter, and that the trial court's memorandum opinion is quite lengthy; now, in order to save unnecessary expense upon appeal, it is here

ORDERED that all four of these cases may be presented, heard and determined on appeal, in so far

as the evidence, testimony, depositions and exhibits are concerned, upon the record of such to be transcribed, printed and sent up in the case of Clallam Lumber Company, a corporation, plaintiff, against Clallam County, a municipal corporation, and Clifford L. Babcock, treasurer, defendants, being Equity cause No. 36 in the trial court, and that the record of the evidence, testimony, depositions and exhibits and the trial court's memorandum decision, need not be transcribed, printed or served or sent up to the Circuit Court of Appeals in the other three cases, but may be considered as incorporated in the record on appeal in each of said causes from the record in Equity cause No. 36 above named.

Dated at Portland, Oregon, this 12th day of December, 1916.

WM. B. GILBERT,
Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

We hereby consent to the rendering and entry of the above order.

Dated at Seattle, Washington, December 11th, 1916.

J. E. FROST,
C. F. RIDDELL,
EDWIN C. EWING,
Counsel for Appellees.

EARLE & STEINERT,
PETERS & POWELL,
Attorneys for Appellants.

Endorsed: Filed in U. S. District Court, Dec. 13, 1916.

No. 56

DECREE

The above entitled cause having come duly and regularly for trial before the undersigned Judge of the United States District Court, the plaintiff appearing by its attorneys, F. W. Keeney, Esquire, Messrs. Earle & Steinert and Messrs. Peters & Powell, and the defendants appearing by Mr. Sanford C. Rose, Prosecuting Attorney for Clallam County, and by

their attorneys, J. E. Frost, Edwin C. Ewing and Jones & Riddell, and there being at issue and ready for trial three other causes now on file in this court, involving substantially the same issues and requiring substantially the same testimony, and counsel for all parties hereto, with the consent of the court, having stipulated that all the testimony introduced insofar as applicable should be considered upon the one trial as having been introduced in each of said causes, the said causes being this cause and cause number 36 in this court, between the same parties, and causes numbered 37 and 57 in this court in which Charles H. Ruddock and Timothy H. McCarthy are plaintiffs, and Clallam County and its Treasurer, in his official capacity as such officer, are defendants; and all parties having introduced testimony and rested, and respective counsel having orally argued this cause to the court, and having submitted briefs to the court, and the court having considered the same and after full consideration of all the facts and the law, being now duly and fully advised in the premises,

It is hereby ORDERED, ADJUDGED AND DECREED that the above entitled cause be and the same hereby is dismissed with prejudice, and that plaintiff take nothing by this cause.

It is further ORDERED, ADJUDGED AND DECREED that all the taxes levied for the year 1914 upon the real property described in the complaint herein, are in all things legal and valid and are due and owing to Clallam County, a municipal corporation of the State of Washington.

It is further hereby ORDERED, ADJUDGED AND DECREED that the above named defendant Clallam County, a municipal corporation of the State of Washington, do have and recover of and against the above named plaintiff Clallam Lumber Company, a corporation, a judgment for its taxable costs and disbursements herein, which are hereby taxed in the sum of Twenty-one Dollars and Ninety Cents ($21.90), for which said sum let execution issue.

To the dismissal of this cause, and to each sepa-

rate paragraph of this decree and to the signing and entry of this decree, the above named plaintiff excepts and its exception is hereby allowed by the court.

Done in open court this 3d day of Feb., 1916.

EDWARD E. CUSHMAN,
District Judge.

Indorsed: Decree. Filed February 3, 1916.

No. 56.

ORDER ON EXCEPTIONS TO AMENDED ANSWER OF THE DEFENDANTS.

The defendants upon the conclusion of the evidence in this cause on the 10th day of December, 1915, obtained permission from the court to amend their answer herein so as to conform to the proofs, which permission was then granted over the objection of the complainant, to which the plaintiff excepted and said exception was then allowed.

The application of the defendants now made to file herein a formal second amended answer embodying these proposed amendments, is now allowed over the objection of the complainant to which exception is reserved by the complainant, and said exception is here and now allowed.

Referring to paragraph XIV of said amended pleading complainant excepts to the amendment which now reads:

> "Defendants admit the practice by assessors and taxing boards of the custom therein referred to and admit the pursuit of such custom by county assessors and its recognition and acquiescence by the State Board of Equalization."

whereas in their former answer they had specifically denied these matters.

And referring to line 29 of said paragraph, defendants now omit, after the words "fair value in money" the following

> "Or upon any other or different basis than that provided by the laws of the State

of Washington at the time the assessments for 1914 were made."

Referring to page 8, they now deny that the interior timber lands of plaintiff were and are valued in the year 1914 for taxation purposes at sums in excess of 50 per cent of the true and fair value thereof in money; whereas they previously admitted the same.

II.

And referring to paragraph XV of said amended pleading complainant excepts to the amendment which now reads:

"Deny that said assessment for the year 1914 was made upon the basis of 84 per cent"

omitting from this amendment what they had formerly pleaded as follows:

"Or upon any other or different basis than the true and fair value in money of the property assessed."

III.

And referring to paragraph XVII, page 9, line 20, defendants in this amendment deny that it has been the custom of the assessor of the county to consult and advise with other members of the County Board of Equalization of said county, and with other parties therein alleged, whereas they formerly admitted the same.

IV.

Referring to paragraph XXII, at page 13, lines 2 and 3 defendants in the amended pleading deny that the timber lands upon the Straits can be readily logged to the Straits, whereas they formerly admitted the same.

V.

Referring to paragraph XXV, at line 19, defendants now omit in toto the allegation which they had previously made in their former answer, as follows:

"But deny that said statute is unconstitutional and deny that said statute is the law."

VI.

In defendants' former pleading they alleged as a second affirmative defense that Section 9112 in Vol. III of Remington & Ballinger's Code of Washington was unconstitutional, inoperative and void, whereas they now exclude this from the amended pleading.

Complainants' objection is based upon the ground that such amendments are not consistent with the proofs and are wholly inconsistent with the pleading upon which the case was tried, and with the position taken by the defendants throughout the trial.

Complainant's exceptions to each of the amendments to the answer in each of the above particulars, are hereby allowed, such exceptions to be entered as of date February 3, 1916.

EDWARD E. CUSHMAN, Judge.

Indorsed: Exceptions to Second Amended Answer of Defendants. Filed February 24, 1916.

No. 56

PETITION TO REHEAR AND TO MODIFY JUDGMENT.

Comes now the plaintiff, Clallam Lumber Company, and respectfully prays this court to grant a rehearing herein, in this:

I

The court erred in sustaining the assessment by Clallam County of the hemlock timber and hemlock ties of the plaintiffs in any sum whatsoever, for the reason that it appeared from the evidence in the entire record that this timber and these ties were of no appreciable market value at the dates of the assessment, nor at any time covered by the facts of this case. The court therefore should have struck such assessment of the plaintiff out, whether the plaintiff had made a case of fraud upon the entire issue or not, since a court of equity having acquired jurisdiction, on the grounds of fraud, would retain it to do equity to the plaintiff, even if the plaintiff failed in sustaining charges of fraud.

Simkins A Federal Equity Suit, p. 27.
Griswold vs. Hilton, 87 Fed. 257.
Waite vs. O'Neill, 34 L. R. A. 550, 76 Fed. 408.
Shainwald vs. Lewis, 69 Fed. 492.

II

The plaintiff respectfully prays the court to modify the judgment and decree by charging the plaintiff or the plaintiff's lands with interest at six per cent per annum from the date of delinquency of taxes, instead of the statutory rate, in view of the plaintiff's good faith in bringing this suit in the prosecution of the same, and on the ground of its being an unnecessary hardship to penalize the plaintiff with so high a rate of interest under the circumstances.

Respectfully submitted,
PETERS & POWELL,
EARLE & STEINERT,
Attorneys for Plaintiff.

United States of America,
State of Washington, ss.
County of King.

Dan Earle being first duly sworn, on oath says: That he is one of the attorneys for the plaintiff in the above entitled cause and makes this verification on its behalf for the reason that said plaintiff has no officer or agent residing in the Western District of Washington; that he has read the foregoing Petition for Rehearing and to Modify Judgment, knows the contents thereof and believes the same to be true.

DAN EARLE,

Subscribed and sworn to before me this 3d day of March, 1916.

(Seal) ROBERT W. REID,
Notary Public in and for the State of Washington, residing at Seattle.

Indorsed: Petition to Rehear and to Modify Judgment. Filed March 3, 1916.

No. 56
Journal Entry
HEARING

Now on this day this cause comes on for hearing on motion for rehearing or review, the Plaintiff being represented by Peters & Powell and D. Earle, and the Defendants represented by C. F. Riddell, and the Court after hearing argument of respective counsel takes the said matter under advisement.

Dated April 18, 1916.
Equity Journal 1—Page 125.

No. 56.
MEMORANDUM DECISION ON PETITION FOR A RE-HEARING
FILED MAY 11, 1916.

Peters & Powell,
Earle & Steinert, For Plaintiffs,
Jones & Riddell,
J. E. Frost,
E. C. Ewing, For Defendants.

CUSHMAN, District Judge.

Insofar as the petition for a re-hearing is aimed at the assessment as affected by the hemlock valuation, all that can be said is that certain phases of the evidence—particularly that of some of defendants' witnesses—are more favorable to plaintiffs as to the overvaluation of the hemlock than that covering the valuation of the fir, spruce and cedar; but, after all is said, it is only a question of overvaluation and, in any event, it is not so palpably excessive as to warrant a finding of fraud.

The cases relied upon by the plaintiffs are not cases of overvaluation, but uniformly involve some other controlling element as: fraud; the adoption of a fundamentally wrong principle; an erroneous system; mistake of law or such palpably excessive overvaluation as to impute fraud.

As to the question of interest on the unpaid and untendered taxes, the laws of Washington provide:

"Hereafter no action or proceeding shall be com-

menced or instituted in any court of this state to enjoin * * * the collection of any taxes * * * unless the person or corporation desiring to commence or institute such action or proceeding shall first pay, or cause to be paid, or shall tender to the officer entitled under the law to receive the same, all taxes, penalties, interest, and costs justly due and unpaid from such person or corporation on the property * * *". (Sec. 955 Rem. & Bal. Code.)

"The county treasurer shall be the receiver and collector of all taxes extended upon the tax-books of the county, whether levied for state, county, school, bridge, road, municipal or other purposes, and also of all fines, forfeitures or penalties received by any person or officer for the use of his county. All taxes upon real property made payable by the provisions of this act shall be due and payable to the treasurer as aforesaid on or before the thirty-first day of May in each year, after which date they shall become delinquent, and interest at the rate of fifteen per cent per annum shall be charged upon such unpaid taxes from the date of delinquency until paid." (Sec. 9219 Rem. & Bal. Code.)

It may be conceded that this suit was brought in entire good faith; that plaintiffs' only remedy was in equity and not at law and that the fifteen per cent. interest charged upon the taxes is a penalty, yet I find no warrant therein given the court to set aside a statute passed to safeguard the sources of the state's revenues.

Re-hearing denied.

Indorsed: Memorandum Decision on Petition for a Rehearing. Filed May 11, 1916.

No. 56

ORDER DENYING PETITION FOR REHEARING

A petition for rehearing having been filed by the plaintiff in the above entitled cause, briefs having been submitted thereon, and the court having considered the same; and the court having on the 11th day of

May, 1916, filed its memorandum decision herein on said petition for rehearing;

Now, therefore, it is hereby ordered that said petition for rehearing be and the same hereby is denied. To the denial of said petition and to the entry of this order plaintiff excepts and exception is hereby allowed.

Done in open Court this 15th day of May, 1916.

EDWARD E. CUSHMAN,
United States District Judge.

Indorsed: Order Denying Petition for Rehearing. Filed May 15, 1916.

No. 56

Tuesday, May 2, 1916.

Court met pursuant to adjournment. Present, Hon. Jeremiah Neterer, Judge; F. L. Crosby, Clerk; Albert Moody, Assistant U. S. Attorney; Crier Kelley, Bailiff Yeaton; W. E. Theodore, Deputy U. S. Marshall.

Whereupon Court stands adjourned sine die.

JEREMIAH NETERER,
District Judge.

No. 56

ORDER AS TO SETTLEMENT OF STATEMENT OF FACTS

This matter coming on now to be heard before the Hon. E. E. Cushman, Judge, upon the consideration and settlement of the statement of facts herein on appeal, proposed by the plaintiff, the plaintiff being present and represented by its counsel, Peters & Powell, and the defendants being present and represented by their counsel, C. F. Riddell, Esq., and it being now represented to the court by both parties that the statement as proposed by the plaintiff and lodged by it with the clerk of this court on the 1st day of September, 1916, and the amendments thereto and alterations thereof proposed by the defendants and lodged with the clerk of this court on the 20th day of October, 1916, as now checked and corrected by said parties, constitute a true and complete statement of all of the

evidence and testimony introduced upon the trial of the above entitled cause, essential to a decision of the questions presented upon the appeal of said cause, together with all exceptions taken and objections made to the admission or exclusion of evidence, and all motions and rulings thereon made upon said trial, and that same contains all the evidence given or offered upon said trial and all the material matters occurring therein not already a part of the record herein; and it being stipulated by said parties in open court that said statement as so amended may be reduced to printed form and in such form may be approved, signed and certified by this court as a true, complete and properly prepared statement on appeal and may thereupon be filed herein as of this date,

IT IS HERE AND NOW ORDERED that the foregoing disposition of the amtter is hereby consented to and made by this court.

Done in open court this 27th day of October, 1916.

EDWARD E. CUSHMAN,

Judge.

Indorsed: Order Settling Statement of Facts on Appeal. Filed October 27, 1916.

No. 56.

ASSIGNMENT OF ERROR ON APPEAL

Now on this 27th day of October, 1916, comes the plaintiff, Clallam Lumber Company, but its solicitors, Earle & Steinert and Peters & Powell, and says that the Decree entered in the above entitled cause on the 3d day of February, 1916, is erroneous and unjust to the plaintiff, for the following reasons:

I

Because the Court overruled the objection of the plaintiff to the following question asked by the defendants' counsel, on cross examination of the witness Thomas Aldwell, a witness for the plaintiff on the value of the Olympic Power Company's plant:

"Do you know what the general impression in Port Angeles and other places was concerning your dam at that time?"

To this plaintiff objected. The objection was

overruled, and the witness answered (Plaintiff reserving and being allowed an exception):

"I think around Port Angeles they were very optimistic."

"Q. (By defendants' counsel): In other words the general impression was that your dam and power site was a failure up there?"

To this the plaintiff objected as being incompetent, irrevelant and immaterial. The objection was overruled, an exception taken and allowed by the Court.

To which question the witness answered substantially that the general impression was that the dam would not hold.

II

Because the Court overruled the objection of the plaintiff to the following question asked by the defendants' counsel on cross examination of the witness Aldwell, a witness for the plaintiff as to the value of town lots in Port Angeles in March of 1913 and 1914;

The witness was asked whether he was not willing to sell some fifty or sixty thousand dollars worth of Port Angeles property that he had for double its assessed value, to which the plaintiff objected as incompetent. The objection was overruled and an exception allowed. The witness answered that he would sell the property at double its assessed value.

This holding of the Court was error.

III

Because the Court erred in admitting the testimony of the defendants' witness C. M. Lauridsen under the following circumstances:

The witness Lauridsen was called by the defendants as an expert upon the value of real estate in Port Angeles and was asked to point out upon a memorandum or tabulation of certain lots what ones he said he would sell on the first of March, 1914, for their assessed value. This was objected to by plaintiff on the ground that it was incompetent, irrelevant and not evidence of the market value of the property.

This objection was overruled by the Court, an exception taken by plaintiff and allowed by the Court.

The witness answered that the property described was upon the last two sheets of this memorandum or tabulation of lots, being Defendants' Exhibit 29.

IV

Because the Court overruled the objection of the plaintiff to the following question put by defendants' counsel to their own witness, C. M. Lauridsen, who was being examined as an expert upon the value of real property in the town of Port Angeles:

"Q. That property, according to Mr. Ware's testimony was worth $6000. on the first of March, 1914. Will you state what you paid for it?

A. I paid $2500. on the 13th of March of that same year."

To which ruling the plaintiff excepted and its exception was allowed by the Court.

V

Because the Court overruled the objection of the plaintiff to the following question put by the defendants to their witness, C. M. Lauridsen:

"Q. State the facts about the purchase of Lots 18 in Block 54 and Lots 7 and 14 in Block 172."

To which the witness answered:

"Lot 18 in Block 54 I bought in January for $300. Lot 7 and 14 in Block 172, the witness says he purchased for $175.

To which ruling the plaintiff excepted and its exception was allowed by the Court.

VI

Because the Court erred in sustaining the objection of the defendants to the following question put by the plaintiff to one of the defendants, Clifford L. Babcock:

"Q. Again in section 18 of your answer you say Deny that the lands and other properties situated at Port Angeles and subject to taxation and valuation upon the assessment rolls as equalized for such years, were valued at not to exceed 10 to 20 per cent. of their true and fair value in money. Could you state then

what you had in mind at that time as the rate at which they were assessed?

To which ruling the plaintiff excepted and its exception was allowed by the Court.

VII

Because the Court, after the conclusion of all the evidence, permitted the defendants to amend their amended answer, in the following particulars, to wit:

(a) In paragraph XIII of their first amended answer the defendants had denied the existence of the practice amongst assessors of the various counties, and particularly Clallam County, of assessing property at from 35 to 50 per cent. of its true value, and had denied the recognition of such custom or practice by the State Board of Equilization.

In said second amended answer they "Admit the practice by assessors and taxing boards of the custom therein referred to and admit the pursuit of such custom therein referred to and admit the pursuit of such custom by the County Assessors and its recognition and acquiescence by the State Board of Equalization" meaning thereby the custom of county assessors of assessing property at from 35 to 50 per cent. of its true value.

(b) In their former answer they had denied "that the Assessor of Clallam County gives out and pretends that for the year 1914, he assessed taxable property within Clallam County upon the basis of 53 per cent. of its true and fair value in money, *or upon any other or different basis than that provided by the laws of the State of Washington at the time the assessment for the year* 1913 *and* 1914 *were made.*"

In their second amended answer, they omit all of that portion above in italics.

(c) In their first amended answer, paragraph XIII, they plead as follows:

"Admit that the interior timber lands in said county including the lands owned by the plaintiff, were and are valued in the year 1914 for the purposes of taxation, at sums in excess of 53 per cent. of the true and fair value thereof in money."

In their second amended answer, they deny this allegation.

To this amendment plaintiff objected at the time, but said objection was overruled and an exception allowed by the Court.

VIII

Because the Court allowed the defendants, over the objection of the plaintiff then made, at the conclusion of the evidence, to amend their answer in the following particulars:

"Deny that said assessment for the year 1914 was made upon the basis of 84 per cent *or upon any other or different basis than the true and fair value in money of all property assessed.*"

Whereas the second amended answer contains the same denial, omitting however the words above in italics.

Plaintiff reserved an exception to this amendment at the time, which was allowed by the Court.

(b) In their first amended answer, in paragraph XXI thereof, they had alleged: "That in the zones abutting upon the Straits of Fuca there lie fine bodies of fir, spruce, cedar and hemlock timber which can readily be logged to the Straits as stated," while in their second amended answer they *deny* that said timber can readily be logged to the Straits as stated.

To this amendment and to the allowance thereof the plaintiff at the time reserved an exception, which was allowed by the Court.

IX

Because the Court erred in decreeing that the taxes for the year 1914 upon the real property of the plaintiff described in the complaint, being to wit, in the sum of $42960.78 (or in any sum in excess of $30,000.00) were legal and valid.

X

The Court erred in adjudging and decreeing the bill of the Plaintiff dismissed and a judgment against the plaintiff for costs.

XI

Because the Court erred in failing to adjudge and

decree that the just and equitable amount to be taxed to the plaintiff's lands set forth in its bill, was not in excess of $25,466.00 and that the plaintiff had tendered this amount, and that the County of Clallam and the Treasurer thereof should be required to accept this amount in full payment for the taxes upon the property described in the bill of complaint, levied for the year 1914, and that the balance of the taxes levied upon said lands should be cancelled and the defendants enjoined from selling said lands for said taxes.

XII

Because the Court erred in its decree in failing to find and decree that the taxes assessed and levied for the year 1914 against the lands of the plaintiff, in the sum of $42,960.78 were grossly in excess of the true and just assessment against said lands for said year, and was the result of fraud and conspiracy on the part of the assessor and Board of Equalization of Clallam County.

XIII

Because the Court erred in refusing to readjust and fix said assessment at a fair and just amount and permit the plaintiff to pay said amount with the credit of $25,466.00 tendered by the plaintiff, and to cancel from said lands the balance of said taxes.

XIV

Because the Court erred, under the evidence, in failing to eliminate the assessments on hemlock timber, ties and poles and in failing to cut down the amount of the tax levy as provided in the decree by at least the sum of $7,335.34.

XV

Because the evidence showed that the allegations of the complaint were true and that the allegations of the second amended answer were not true.

XVI

Because the Court erred in entering judgment that the plaintiff take nothing by this action and that the defendants go hence without day and recover their costs.

XVII

Because the Court erred in not entering judgment for the plaintiff and against the defendants in accordance with the prayer of the complaint.

XVIII

Because the evidence showed that the plaintiff's lands set out in the bill of complaint were assessed by Clallam County for the year 1914 taxes in the sum of $42,960.28, whereas the just and fair assessment of such lands did not exceed the sum of $25,466.00, and that this over-assessment was the result of fraudulent conspiracy and discrimination on the part of the assessing and taxing authorities of Clallam County as against the plaintiff and other timber lands, and in favor of other classes of property in the said Clallam County, and that said fraudulent conspiracy had been carried on and persisted in by said officers for a number of years prior to the time of such assessment.

Wherefore plaintiff prays that such judgment be reversed and that this Honorable Court will direct the entry of a judgment or decree in accordance with the prayer of plaintiff's complaint.

EARLE & STEINERT,
PETERS & POWELL,
Attorneys for Plaintiffs.

Indorsed: Assignments of Error on Appeal. Filed October 27, 1916.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

IN EQUITY—NO. 56

CLALLAM LUMBER COMPANY, a corporation,

Plaintiff,

vs.

CLALLAM COUNTY, a municipal corporation, and HERBERT H. WOOD, Treasurer,

Defendants.

PETITION FOR APPEAL

Filed Oct. 27, 1916, in the District Court of the United States for the Western District of Washington.

TO THE HONORABLE EDWARD E. CUSHMAN, DISTRICT JUDGE:

The above named plaintiff, feeling itself aggrieved by the decree made and entered in this cause, on the 3rd day of February, 1916, and, after motion for rehearing, upon the 16th day of May, 1916, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignments of Errors, which is filed herewith, and prays that its appeal be allowed and that citation issue as provided by law ,and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, and your petitioner further prays that the proper order touching the security to be required of it to perfect its appeal may be made.

EARLE & STEINERT,
PETERS & POWELL,
Solicitors.

The petition granted and the appeal allowed upon giving bond conditioned as required by law in the sum of Five hundred Dollars.

EDWARD E. CUSHMAN,
Judge of said Court.

Dated at Seattle, Oct. 27, 1916.

Indorsed: Petition for Appeal. Filed Oct. 27, 1916.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

IN EQUITY—NO. 56

CLALLAM LUMBER COMPANY,
a corporation,
Plaintiff,

vs.

CLALLAM COUNTY, a municipal corporation, and HERBERT H. WOOD, Treasurer,

Defendants.

BOND ON APPEAL

KNOW ALL MEN BY THESE PRESENTS:

That we, Clallam Lumber Company, as principal, and Massachusetts Bonding and Insurance Company, as surety, acknowledge ourselves to be jointly indebted to the County of Clallam and Herbert H. Wood, treasurer, appellees, in the above entitled cause, in the sum of Five hundred ($500.00) Dollars, conditioned that,

Whereas, on the 3rd day of February, 1916, and after petition for re-hearing thereon, on the 16th day of May, 1916, in the District Court of the United States for the Western District of Washington, in a suit depending in that court, wherein Clallam Lumber Company was plaintiff and Clallam county and Herbert E. Wood, were defendants, numbered on the Equity Docket as fifty-six, a decree was rendered against the said Clallam Lumber Company and the said Clallam Lumber Company, having obtained an appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit, and filed a copy thereof in the office of the clerk of court, to reverse the said decree, and citation directed to the said county of Clallam, and to the said Herbert E. Wood, treasurer, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the city of San Francisco, in the State of California, on the 26th day of November, 1916, next.

Now, if the said Clallam Lumber Company shall prosecute its appeal to effect and shall answer all costs, if it fails to make its appeal good, then the obligation to be void, else to remain in full force and virtue.

CLALLAM LUMBER COMPANY,
By W. A. Peters, its attorney.
And
MASSACHUSETTS BONDING AND INSURANCE COMPANY.
(Seal)

By Fredk. B. Potwin, Its Attorney-in-Fact.
Surety.

Approved Oct. 27, 1916.
EDWARD E. CUSHMAN, Judge.

Indorsed: Bond on Appeal. Filed October 27, 1916.

No. 56

ORDER AS TO EXHIBITS

It appearing, in the opinion of the judge presiding in the United States District Court for the Western District of Washington, Northern Division, necessary and proper that the original exhibits offered and receved in evidence or filed in said cause on trial thereof, should be inspected in the above entitled court upon appeal,

IT IS ORDERED that said original exhibits be retained for safe keeping by the clerk of said District Court, to be by him transmitted under his hand and seal of said District Court to the clerk of the above entitled court at San Francisco, California, as a supplemental record herein upon appeal.

Dated at Seattle, Washington, October 27, 1916.
EDWARD E. CUSHMAN,
Judge of the United States District Court, Western District of Washington sitting in the Northern Division.

Indorsed: Order as to Exhibits. Filed October 27, 1916.

No. 56

ORDER EXTENDING TIME TO DOCKET CAUSE ON APPEAL

Now on this 2d day of November, 1916, the above entitled cause came on to be heard upon the motion of Clallam Lumber Company, Appellant, for an order extending the time in which to docket this case and to file the record thereof with the Clerk of the Circuit Court of Appeals for the Ninth Circuit, upon the ground that the same is necessary by reason of the great bulk of the record to be transcribed or printed herein, and

the court upon hearing said motion and being fully advised in the premises, and considering that good cause has been shown for granting the same, and being the Judge who signed the Citation on appeal herein;

IT IS ORDERED That the time within which said appellant shall docket said cause on appeal and the return day named in the Citation issued by this Court, be enlarged to and including the 1st day of January, 1917.

EDWARD E. CUSHMAN, Judge.

Service of the foregoing Order and receipt of a copy thereof admitted this 2d day of November, 1916.

S. C. ROSE,
C. F. RIDDELL,
Attorneys for Defendants, Appellees.

Indorsed: Order Extending Time to Docket Cause on Appeal. Filed November 2, 1916.

No. 56

STIPULATION AND ORDER AS TO RECORD

It is hereby stipulated by and between the parties plaintiff and defendant through their respective counsel, that in preparing the transcript and record on appeal all captions, except the name of the paper and number of the cause, except where specially noted in the Praecipe for record on appeal, and all verifications, all certificates of notaries public or other officers or officials to all depositions taken and also the stipulation with reference to taking the depositions, may be omitted, and that all indorsements except to show the name of the paper and date of filing, and all acceptances of service of papers, may be omitted.

PETERS & POWELL,
Attorneys for Plaintiff.
S. C. ROSE,
C. F. RIDDELL,
Attorneys for Defendants.

On reading the foregoing Stipulation as to the record on appeal in this cause it is ordered that said record may be so prepared and filed.

Dated at Seattle, Washington, this 2d day of November, 1916.

EDWARD E. CUSHMAN,
Judge of the above entitled Court.

Indorsed: Stipulation and Order as to Record. Filed November 2, 1916.

No. 56

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

No. 56

Clallam Lumber Company, a corporation,

Plaintiff, Appellant,

vs.

Clallam County, a municipal corporation, and Herbert H. Wood, Treasurer,

Defendants, Appellees.

UNITED STATES OF AMERICA
T O
CLALLAM COUNTY, A municipal corporation, and HERBERT H. WOOD, Treasurer.

CITATION
A GREETING:

You and each of you are hereby notified that in a certain suit in the United States District Court for the Western District of Washington, Northern Division, wherein Clallam Lumber Company, a corporation, is plaintiff, and the above named Clallam County and Herbert H. Wood, Treasurer, are defendants, an appeal has been allowed the plaintiff therein to the United States Circuit Court of Appeals for the Ninth Circuit.

You are hereby cited and admonished to be and appear in said United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, State of California, thirty days after the date of this Citation, to show cause, if any there be why the order

and decree appealed from should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable E. E. Cushman, Judge of the United States District Court for the Western District of Washington, sitting in the Northern Division, this 27th day of October, 1916.

EDWARD E. CUSHMAN,
United States District Judge for the Western District of Washington, sitting in the Northern Division.

Received a copy of the above and foregoing Citation this 27th day of Oct., 1916.

SANDFORD C. ROSE,
DEVILLO LEWIS,
EDWIN C. EWING,
R. S. JONES,
C. F. RIDDELL,
Attorneys for above named appellees.

Indorsed: No. 56. In the District Court of the United States, Western District of Washington, Northern Division, Clallam Lumber Company, a corporation, Plaintiff, vs. Clallam County, et al., Defendants. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Oct. 27, 1916. Frank L .Crosby, Clerk. By Ed M. Lakin, Deputy. Peters & Powell. Earle & Steinert, Attorneys for Plaintiffs. Rooms 546-551 New York Building, Seattle, Washington.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

No. 56

CLALLAM LUMBER COMPANY, a corporation,

Plaintiff,

vs.

CLALLAM COUNTY, a municipal corporation, and Herbert H. Wood, Treasurer,

Defendants.

PRAECIPE

TO THE CLERK OF THE ABOVE ENTITLED COURT:

You will please prepare a record on appeal in the above entitled cause, consisting of the following:

(1) Caption exhibiting the proper style of court and title of the case; a statement showing the time of commencement of the case; names of the parties; the several dates when the respective pleadings were filed; the time when the trial was had; the name of the judge hearing same; dates of entry of the decree; of plaintiff's petition for rehearing; of argument on petition to rehear and of the court's taking same under advisement; of the entry of final order denying petition to rehear; of filing petition for appeal; of allowance of petition by the court and the filing of assignment of errors.

(2) Plaintiff's complaint filed March 8, 1915.

(3) Defendant's motion to dismiss plaintiff's bill of complaint filed March ....., 1915.

(4) Order denying defendants' motion to dismiss complaint filed March 29, 1915.

(5) Defendant's answer filed May 3, 1915.

(6) Statement of testimony as approved by the court and filed in said cause.

(7) Stipulation with reference to transcribing pleadings and amended pleadings in this record.

(8) The following depositions taken and filed in this cause on the ..... day of ....., 1915, to wit:

Testimony of R. W. Schumacher and J. P. Christensen.

Testimony of J. A. Adams.

The following portions of the testimony of William Garlick: Page 27, lines 6 to 22 inclusive; page 50, line 25 to line 2 on page 51; page 52, lines 3 to 18 inclusive; page 57 lines 21 to 30 inclusive. All cross-examination, re-direct examination and re-cross examination of the witness Garlick.

Testimony of Charles F. Seal, page 66, lines 6 to 13 both inclusive.

(9) The following exhibits in the case:

Plaintiff's Exhibit P being a letter from Christensen to Grasty dated April 29, 1914.

Plaintiff's Exhibit L, being letter of J. C. Hansen to Grasty.

Plaintiff's Exhibit M, letter of Clifford L. Babcock to Grasty.

Plaintiff's Exhibit N, letter from Lewis Levy to Grasty.

Plaintiff's Exhibit F, letter from Thomas Aldwell to Grasty, dated April 29, 1914.

Plaintiff's Exhibit E, being photographed list of appraisal of properties by Thomas Aldwell.

Plaintiff's Exhibit FF. Statement showing assessment of shingle mills in Clallam County.

Plaintiff's Exhibit T. Assessment of Olympic Power Company's property.

Plaintiff's Exhibit CC. Written statement from Henry to Grasty.

Statement as to assessment of banks, filed Dec. 11, 1915, in cause No. 36.

(11) Memo decision filed January 22, 1916.

(12) Decree rendered and entered February 3, 1916.

(13) Plaintiff's exceptions to allowance of amendment of Defendants' answer and order allowing amendments filed February 3, 1916.

(14) Plaintiff's petition to rehear and modify judgment filed March 3, 1916.

(15) Journal entry showing hearing on petition to rehear entered April 18, 1916.

(16) Memo. decision upon petition to rehear filed May 11, 1916.

(17) Order denying petition to rehear filed May 15, 1916.

(18) Plaintiff's notice to defendants of the lodgment of statement of facts, filed September 1, 1916.

(19) Plaintiff's assignment of errors, filed Oct. 27, 1916.

(20) Plaintiff's petition for appeal and order allowing same.

(20½) Bond on Appeal and approval thereof.

(21) Citation on appeal and admission of service thereof by the defendants.

(22) Order of court to send up original exhibits.

(All the above, 20, 21 and 22, filed Oct. 27, 1916.)

(23) Journal entry showing adjournment of term of District Court immediately preceding term commencing first Tuesday in May, 1916.

(24) Order of court upon stipulation of parties with respect to settlement of statement of facts, filed Oct. 27, 1916.

(25) This Praecipe with admission of service thereon by defendants.

(26) Index to all of the above.

Dated at Seattle, Washington, this 30 day of Oct., 1916.

EARLE & STEINERT,
PETERS & POWELL,
Attorneys for Plaintiff, Appellant.

Copy of the foregoing Praecipe received this 31st day of October, 1916.

SANDFORD C. ROSE,
DEVILLO LEWIS,
J. E. FROST,
E. C. EWING,
JONES & RIDDELL,
Attorneys for Defts. Appellees.

Indorsed: Praecipe for Transcript. Filed Oct. 31, 1916.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

CLALLAM LUMBER COMPANY, a corporation,
Plaintiff,

vs.

CLALLAM COUNTY, a municipal corporation, and HERBERT H. WOOD, Treasurer,
Defendants.

In Equity—No. 56

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD

UNITED STATES OF AMERICA
WESTERN DISTRICT OF WASHINGTON—SS.

I, Frank L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify the foregoing 103 printed pages numbered from 1 to 103, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as are necessary to the hearing of said cause in the United States Circuit Court of Appeals for the Ninth Circuit, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the appellant for making the record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, to wit:

Clerk's fee (Sec. 828 R. S. U. S.), for making record, certificate or return, 368 folios at 15c ..... $ 55.20

Certificate of Clerk to transcript of record—4 folios at 15c ..... .60

Seal to said Certificate..... .20
Statement of cost of printing said transcript of record, collected and paid..... 99.75

Total $155.75

I hereby certify that the above cost for preparing, certifying and printing the record amounting to $155.75 has been paid to me by counsel for appellants.

I further certify that I hereto attach and herewith transmit the original Citation issued in this cause, and under separate cover the Stipulation and Order to hear this cause on the Evidence Printed in Equity Cause No. 36 on appeal to this same term.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 27th day of December, 1916.

FRANK L. CROSBY,
Clerk United States District Court.

(SEAL)

No. 2908

Re 2905

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES H. RUDDOCK and TIMOTHY H. McCARTHY, Plaintiffs,

Appellants

vs.

CLALLAM COUNTY, a Municipal Corporation, and HERBERT H. WOOD, Treasurer, Defendants,

Appellees

RECORD ON APPEAL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

SHERMAN PRINTING AND BINDING CO., SEATTLE, WASH.

NO.....

IN THE

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SHERMAN PRINTING & BINDING CO., SEATTLE, WASH.

No. 57

INDEX OF THE PRINTED TRANSCRIPT OF RECORD

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRIC OF WASHINGTON, NORTHERN DIVISION
IN EQUITY—NO. 57

CHARLES H. RUDDOCK and
TIMOTHY H. McCARTHY,
Plaintiffs,

vs.

CLALLAM COUNTY, a municipal corporation and Herbert H. Wood, Treasurer,
Defendants.

NAMES AND ADDRESSES OF COUNSEL:

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JOHN E. FROST, ESQ.,
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DEVILLO LEWIS, ESQ.,
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Port Angeles, Washington.

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Solicitor for Defendants,
627 Colman Building, Seattle, Washington.

STATEMENT

Time of commencement of suit, March 6, 1916.

Names of parties to suit: Charles H. Ruddock and Timothy H. McCarthy, plaintiffs and appellants; Clallam County, a municipal corporation, and Herbert H. Wood, Treasurer, defendants and appellees.

Dates of filing respective pleadings:

Plaintiffs' bill of complaint filed March 6, 1915.

Defendants' motion to dismiss filed March 26, 1915.

Order denying defendants' motion to dismiss filed March 29, 1915.

Defendants' answer to complaint filed May 3, 1915.

Stipulation of parties with reference to amended answer, filed November 6, 1916.

On September 1, 1915, before the Hon. E. E. Cushman, Judge, this cause in conjunction with Equity Cause No. 36, entitled Clallam Lumber Company, a corporation, plaintiff, vs. Clallam County, a municipal corporation, and Clifford L. Babcock, Treasurer, defendants; Equity Cause No. 37, entitled Charles H. Ruddock and Timothy H. McCarthy, plaintiffs, vs. Clallam County, a municipal corporation, and Clifford L. Babcock, Treasurer, defendants, and Equity Cause No. 56, entitled Clallam Lumber Company, plaintiff, vs. Clallam County, a municipal corporation, and Herbert H. Wood, Treasurer, defendants, the same being consolidated for trial, were tried upon the testimony of witnesses produced before the court, and upon exhibits offered in evidence by the respective parties, which have been returned and filed herein, and upon the depositions taken under stipulation of the parties and exhibits annexed thereto.

Counsel for the respective parties appeared and argued said cause in open court and thereafter submitted written briefs to said court.

Thereafter, on January 22, 1916, the Judge before whom said causes were tried and heard made and filed his memorandum decision.

Decree was made, entered and filed in said cause on February 3, 1916.

Plaintiffs made and filed petition for rehearing March 3, 1916.

Argument had on petition to rehear before Hon. E. E. Cushman, Judge, and taken under advisement by him April 18, 1916.

Memorandum decision on petition to rehear rendered and filed by Hon. E. E. Cushman, Judge, on May 11, 1916.

Final order denying petition for rehearing made and filed May 15, 1916.

Journal entry of said court adjourning the November term and opening the May term of court May 2, 1916.

Assignment of errors, petition for appeal, allowance of appeal, bond on appeal with approval thereof, filed October 27, 1916.

Citation on appeal issued served and filed October 27, 1916.

Statement of Facts Certified by Judge. Filed Oct. 27, 1916.

Order of Court, E. E. Cushman, Judge, enlarging time to docket case on appeal and return of citation made and entered Nov. 2, 1916.

Order of Judge of U. S. Circuit Court of Appeals, Ninth Circuit, on stipulation of parties that this cause be heard on Statement of Facts Printed in Cause Clallam Lumber Co. vs. Clallam County, on appeal to this same term made Dec. 12, 1916.

IN EQUITY—NO. 57
BILL OF COMPLAINT

TO THE JUDGE OF THE DISTRICT COURT OF THE UNITED STATES, FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION, SITTING IN EQUITY:

The plaintiffs Charles H. Ruddock and Timothy H. McCarthy, bring this their Bill of Complaint against Clallam County, a municipal corporation, and Herbert H. Wood, Treasurer of said county, and humbly

complaining, respectfully show your Honor as follows:

I

The plaintiff Charles H. Ruddock is a resident, a citizen and an inhabitant of the City of New York, State of New York, and the plaintiff Timothy H. McCarthy is a citizen, a resident and an inhabitant of the city of New Orleans, Louisiana.

II

That at all the times herein mentioned, the defendant County of Clallam, was and now is a county of the state of Washington, situate in the Northern Division of the Western District thereof, and as such a municipal corporation under the constitution and laws of said state and a citizen of the state of Washington.

III

The defendants Herbert H. Wood now is, and ever since the 11th day of January, 1915, has been the duly elected, qualified and acting Treasurer of said County of Clallam, and a citizen of said State of Washington, and a resident and inhabitant of Clallam County, in the Northern Division of the Western District thereof.

IV

The matter of controversy in this suit exceeds, exclusive of interest and costs, the sum of Three Thousand ($3000) Dollars, and is to wit: approximately the sum of Seven Thousand ($7000) Dollars and over.

V

The plaintiffs are the owners of certain timber lands situate in said Clallam County, a list of which containing the correct description thereof, is hereto attached and marked Exhibit "A" and made a part hereof. The said lands contain in the aggregate 7941.06 acres of land, according to the Government survey, more or less. These plaintiffs have been the owners of said lands for four years or thereabouts, last past, and more. Said lands constitute substantially a solid body lying in the interior of Clallam County along the valleys of the Solduc and Calawa Rivers.

VI

For the purpose of assessment for taxation and as a basis thereof, the assessing officers of Clallam County

have from time to time, during the last five or six years, caused timber lands in said county to be cruised, and the cruises and estimates thus made to be adopted by the county. Most of the timber lands in the county owned by private parties, as distinguished from the government lands, have now been cruised, and all of the lands owned by these plaintiffs have been so cruised, and so far as respects timber lands within the county, upon which cruises have thus been made, it is claimed by the assessing officers that the same have been assessed upon the basis of the cruises thus obtained. The assessments made by the assessing officers of the county have been made, however, according to certain zones or districts which the assessing officers have arbitrarily, unreasonably and unlawfully laid off and determined without reference to and in disregard of the true or fair value in money of timber on the lands within such zones or districts respectively.

VII

One of these zones thus arbitrarily laid out abuts immediately upon the Straits of Fuca and extends east and west along the Straits for a distance of approximately 35 miles, and extends back from the Straits into the interior distances varying approximately from three to eight miles. Within this zone are included those timber lands which, of all timber lands within the county, are of the greatest value, not merely because the timber thereon is of excellent quality, but particularly because of the location thereof, the same being situate immediately upon tidewater or adjacent thereto, and thus rendered immediately accessible to the markets of the world. Within this zone the timber is valued for the year 1914 by the assessing officers of Clallam County, as follows: Fir, spruce and cedar at 90c per thousand feet; hemlock at 40c per thousand feet. In this and all other zones, in addition to the value placed by the assessing officers on the timber, there was for the year 1914, placed upon the lands themselves a value of $1.00 to $5.00 per acre, and the same, in the case of these plaintiffs' lands, was done arbitrarily, unreasonably and unlawfully and without any reference to

the actual value thereof. Many of the lands owned by these plaintiffs are of no value whatsoever, independent of the timber standing or being thereon.

VIII

Another zone thus arbitrarily, unreasonably and unlawfully set off by the assessing officers lies in the Western part of Clallam County. No part thereof lies nearer to the Straits than approximately four to six miles, and no lands within this zone owned by the plaintiffs lie nearer to the Straits than approximately nine miles, and the great body of the lands owned by these plaintiffs within this zone, lie much more distant therefrom. Said zone or district is irregular in form and extends southerly until it reaches the line of Jefferson County, a distance of approximately thirty miles from the Straits of Fuca. There are no harbors upon the Pacific Ocean within the County of Clallam or Jefferson at or through which the timber on the lands of the plaintiffs might or could be brought to market. Within the zone or district described in this paragraph there is a large acreage of land and upon the timber lands within this zone the assessing officers of Clallam County put for the year 1914 for the purposes of taxation the following values, to wit: Upon fir, spruce and cedar timber a valuation of 80c per thousand feet; and upon hemlock a valuation of 40c per thousand feet; upon poles 10c each and upon piles 2c each. In this zone the plaintiffs own lands approximately 7941.06 acres in extent, and the timber upon the same according to the cruise made by the county of Clallam amounts in the aggregate to approximately 715,000 M feet of all sorts, as more fully set forth in Schedule "B" hereto attached and made a part hereof. The value of the lands of the plaintiffs within this zone as fixed and determined by the assessing officers for Clallam County for the year 1914 for the purposes of taxation is $561,395. All the lands owned by these plaintiffs within this zone are separated from the Straits by a range of mountains.

IX

It has been the practice and custom throughout the

state of Washington for four years or more last past, for the assessing officers and boards of equalization to assess and equalize property for the purposes of taxation, at less than its actual, and full value, the assessors and taxing officers of the various counties assuming some arbitrary standard which has usually been from 35 to 50 per cent of the actual value of the property taxed. This has been known to and acquiesced in by the State Board of Equalization in equalizing such taxes. The assessor of the County of Clallam announces and pretends that for the year 1914 he assessed taxable property within the county of Clallam at and upon the basis of 50 per cent of the true and fair value thereof in money; and the members of the County Board of Equalization announced and pretend that they equalized and approved the assessments upon the taxable property within said county for such year at and upon the same basis. But these plaintiffs aver that such claims and pretenses are untrue in fact, and that the interior timber lands in said county, and in particular the lands owned by these plaintiffs, were and are valued for the purposes of taxation in the year 1914, at sums greatly in excess of 50 per cent of the true and fair valuation thereof in money; that the other properties, real and personal in said county, were valued at sums much less than 50 per cent of the true and fair value thereof in money; and that these plaintiffs were grossly and intentionally discriminated against by the assessing officers of Clallam County in the matter of assessment and taxation upon their lands for the year 1914.

The timber upon the lands of the plaintiffs, as shown by the cruise thus made by the County of Clallam, amounts in the aggregate to approximately 715,000 M feet of all sorts, as more fully shown by Exhibit B attached hereto and made a part hereof. The assessments on the lands of the plaintiffs for the year 1914 were made upon the basis of said cruise and these plaintiffs aver that the timber upon their lands was greatly over-valued by the assessing officers of Clallam County in the valuations put thereon by them for the

purposes of taxation in the year 1914. The valuations thus placed by the assessing officers of Clallam County upon the lands of these plaintiffs described in Exhibit "A" hereto attached, for the purposes of taxation, for the year 1914, amount in the aggregate to $561,395. These plaintiffs aver that the true and fair value in money of said lands does not exceed the sum of $550,000. and did not exceed that sum in the year 1914, when said assessment was made. Such assessment was therefore made upon the basis of approximately 102 per cent of the true and fair value thereof in money. No property in said Clallam County, except the timber lands owned by the plaintiffs, and perhaps certain other timber lands similarly situated in the interior of said county, were assessed in said year 1914, at so great a proportion of the true and fair value thereof in money. Such assessment upon the lands of the plaintiffs at so large a percentage of the true and fair value thereof in money was not accidental or unintentional on the part of said assessing officers of Clallam County, but was intentional and willful, and as these plaintiffs aver, was in pursuance of a concerted effort and corrupt and unlawful combination and conspiracy between the assessor of Clallam County and the other members of the County Board of Equalization of said County of Clallam. Some of the facts relating to the nature of said combination and conspiracy and to the unlawful assessment so made are hereinafter set forth.

XI

The timber lands in the County of Clallam are situate for the most part in the westerly end thereof, the timbered portion of the county owned by private parties and subject to assessment being situate almost entirely within that portion of the county lying west of Range eight and extending from thence practically to the Pacific Ocean. This territory is sparcely settled, containing only a few hundred inhabitants at the most, and those settled for the greater part at Forks and Quillayute Prairies (so-called), Comparatively few of the voters of the county therefore, reside in the

west end district. The county seat of the county is the city of Port Angeles, in the middle district, said city containing approximately 5000 in number. In the east district (so-called) are prosperous farming communities, the same being well settled, particularly in the vicinity of Sequim and Dungeness, the population in said east district being approximately 1500 in number. The voting power of the county is, therefore, in the east and middle Commissioners' districts and particularly in that easterly portion of the county extending from and including Port Angeles to the east county line, the voters in the west district being so few that they have little voice in the county affairs. The lands in the west end of the county, being almost entirely timbered lands, except at the small prairies of Forks and Quillayute, are incapable at the present time of supporting any considerable population. They are mostly owned by non-residents of said county.

XII

The assessing officers of the county of Clallam (with the exception of one County Commissioner from the west district) are elected by the votes of those resident in the middle and east districts. Because of the preponderance of votes in those districts, and for the purpose, as these plaintiffs aver, of ingratiating themselves with their constituents and serving their own individual and selfish ends, the said assessing officers of Clallam County have wrongfully, unlawfully, and corruptly combined and concerted together with the intent and purpose to increase the assessments upon the timber lands in the west end of the county beyond their proportion of the true and fair value of the property within the county, and to lower and depreciate the assessments upon the property in the city of Port Angeles, and contiguous thereto or in that vicinity, the farming lands in the east end of the county and other properties within the county, and especially in the middle and east districts thereof and to assess the same upon a basis and at a valuation far below their proportion of the true and fair value of the property subject to assessment in Clallam County. In pursuance of this

combination and conspiracy it has been the custom of the assessor of the County of Clallam to consult and advise with the other members of the County Board of Equalization, or with all those resident in the middle and east districts, in making his assessment rolls, and that custom, as these plaintiffs are informed and believe, was followed by the assessor in making his rolls for 1912, 1913 and 1914. The assessment roll, as prepared by the assessor does not, therefore, and in each of the years above mentioned did not represent the judgment of the assessor, but was and is the result of the combination and conspiracy with other members of said County Board of Equalization, and this roll thus prepared by the assessing officer, is approved as a matter of course, in all substantial respects, and particularly as relates to assessments of timber lands, by the County Board of Equalization when it meets to review the same. As a result, no fair hearing as contemplated by statute, is possible to be had on appeal to said Board. And these plaintiffs aver that this practice has been followed in Clallam County for several years continuously last past and that, when these plaintiffs appealed to said Board in the year 1910, their attorney addressed said Board at the meeting of its session, and was told in substance by one of the members of said Board, speaking in its behalf, that it was needless to introduce any evidence of values of timber lands for no such evidence would change the views of said board.

XIII

In the years 1912, 1913 and 1914 and prior thereto, gross discriminations were practiced by the assessing officers of Clallam County against your plaintiffs and other owners of timber lands in the interior of the county and in favor of other owners of property subject to taxation in Clallam County. These discriminations were aimed in particular at these plaintiffs and other owners of interior timber for the reason that they own large bodies of lands in said county, but control no votes and exercise no political influence therein, and the size of their holdings has constituted an inducement

to said assessing officers to place a large and greatly disproportionate share of the taxes levied within the county upon these plaintiffs and such other owners of interior timber, and thereby relieve other property owners within the county of some portion of that burden of taxation, which under the Constitution and laws of Washington, equitably and lawfully falls upon them. These discriminations thus practiced against these plaintiffs have been and are with the intent and purpose to favor, at the expense of the plaintiffs and other owners of interior timber, all owners of property at Port Angeles and in the vicinity thereof, all owners of property in the east district (so called), all owners of personal property throughout the county and likewise the owners of timber lands immediately upon the Straits.

XIV

The plaintiffs have caused diligent and careful examination to be made of the assessment rolls of Clallam County for the years 1912, 1913 and 1914, and a like examination of property values within the county, and as a result thereof now find that the lands and other properties situate at Port Angeles and subject to taxation, are valued upon said assessment rolls as equalized for such years at not to exceed 10 to 20 per cent of their true value in money. The County Board of Equalization of Clallam County is, and for the years 1912, 1913 and 1914 was composed of five members, of whom three are the county commissioners and the other two are the County Treasurer and the County Assessor respectively. Of said members of the Board one County Commissioner, representing the middle district, resides at Port Angeles, and is chairman of the Board. The County Treasurer and County Assessor also reside at Port Angeles. A fourth member resides in the east district, and the remaining member in the west district. Three out of the five members of the County Board of Equalization are therefore residents of Port Angeles and the major part of the population of the county is also found at Port Angeles. These members of the Board resident at Port Angeles are themselves owners of property at Port Angeles.

In order to favor themselves and their constituents at Port Angeles aforesaid, the three members resident at Port Angeles have combined and conspired with the east end Commissioner to put low valuations upon the property at Port Angeles and vicinity, and high and unequal valuations upon the timber lands situate in the west end of the county and in particular upon the timber lands of these plaintiffs and other owners of timber lands in the interior of Clallam County.

XV

As the result of diligent and careful examination made by these plaintiffs of the assessment rolls of Clallam County for the years 1912, 1913 and 1914, and a like examination of the property values within the county, these plaintiffs find that the farming lands and other properties situate in the east end subject to taxation are valued upon said tax rolls as equalized for such years, at not to exceed 25 to 30 per cent of their true and fair value in money.

XVI

As the result of diligent and careful examination made by the plaintiffs of the assessment roll of Clallam County for the years 1912, 1913 and 1914 and a like examination of the property of others within the county, plaintiffs find that the personal property within said county consisting of stocks and goods, wares and merchandise at Port Angeles, and other personal properties situate at Port Angeles and elsewhere within the county, are valued by the assessing officers of Clallam County for the year 1914 at not to exceed 10 to 15 per cent of their true and fair value in money.

XVII

The lands owned by the plaintiffs lie, as hereinbefore stated, in the valleys of the Solduc and Calawa Rivers and upon the benches and ridges between the same, or adjacent thereto. These lands are at present wholly destitute of facilities for transportation and it is impossible to bring the timber thereon into the market. In order to bring said timber to market it is necessary that facilities be provided for transportation to Gray's Harbor on the south or to the Straits of Fuca on the

north. Grays' Harbor is far distant, no railroad from that direction extending farther north than Moclips, a distance of more than sixty miles from the lands of your plaintiffs. Few of the lands of the plaintiffs are less than twelve miles from the Straits and most of them lie a still greater distance therefrom, and all of said lands of the plaintiffs are cut off from the Straits by the range of mountains running east and west through the county of Clallam. It is therefore impossible to bring the timber from plaintiffs' land to market except by transporting the logs or lumber cut therefrom across this range of mountains. This cannot be accomplished except by the construction of a railroad at great expense. This expense is beyond any present means at the command of the plaintiffs and is likewise an expense which, in the present conditions of the lumber market, or in any conditions of the lumber market which have at any time heretofore prevailed on the Pacific Coast, is prohibitive. This fact has a direct and important bearing on the present value of the plaintiffs' land. Upon the Straits of Fuca however, and immediately adjoining tide-water, there lie fine bodies of fir, spruce, cedar and hemlock timber, which can readily be logged to the Straits at the present time. Extensive logging operations have for many years been carried on and are now being carried on in this portion of Clallam County lying immediately upon the Straits. This Straits timber (so-called) is in the zone or district arbitrarily, unreasonably and unlawfully laid off by the assessing officers as recited in paragraph VII, in which zone or district the timber is valued for the year 1914 by the assessing officers of Clallam County as follows: Fir, spruce and cedar 90c per thousand feet, and hemlock at 40c per thousand feet; whereas upon the lands of these plaintiffs which lie within the interior of the county and separated from tide-water by a range of mountains the timber is assessed at slightly lower figures, being 80c for fir, spruce and cedar, and 40c for hemlock. These plaintiffs say that the true and fair value in money of said timber so lying upon tide-water or adjacent thereto, is

at least twice the true and fair value in money of the timber on these plaintiffs' lands.

XVIII

The Ciy of Port Angeles, where the majority of the voters of Clallam County reside, is situate at tidewater and upon a harbor which it is the wish of the inhabitants of said city may become the seat of a considerable commerce. To this end there is an ardent desire on the part of the inhabitants of Port Angeles that the timber owners of Clallam County build mills at Port Angeles, construct railroads into the interior of the county, transport logs from the interior of the County to Port Angeles, and saw the same into lumber at that city, thereby adding to the growth and development of Port Angeles as respects both industries and population. Various of the inhabitants of Port Angeles, including the assessor, have complained to these plaintiffs that, because they failed to build saw mills and railroads or cause the same to be done, they had pursued and were pursuing a policy hostile to the true interests of the county and especially of Port Angeles, and that such interests would be promoted only by building saw mills and railroads; and these plaintiffs aver that, as part of the combination and conspiracy aforesaid, it is the purpose of the assessing officers of Clallam County, representing as they believe the sentiment among the voters at Port Angeles, to assess the timber lands in the west end of Clallam County at exorbitant sums, as a means of compelling the erection of mills at Port Angeles, the construction of railroads into the interior of the county, and the commencement and carrying on of logging and lumbering operations within the county. In particular it has been and is a part of said combination and conspiracy to compel the plaintiffs, as some of the large timber land owners of Clallam County, to erect such mills and construct such railroad and commence and conduct lumbering operations; and through influential citizens of Port Angeles, these plaintiffs have been assured that, if they would begin to operate their timber and employ a considerable number of men, they might rely that they

would henceforth be fairly and equitably treated as respects taxation. The plaintiffs aver that the majority of the members of the Board of Equalization are themselves owners of real property at Port Angeles and are therefore, personally interested in its rapid growth and development, and desire, for their individual aggrandizement, to compel the plaintiffs to erect mills and construct railroads and commence and conduct lumbering operations, despite the fact that no such operations can be conducted with profit in the market conditions now prevailing.

XIX

The plaintiffs aver that the unequal, discriminating and unlawful assessments which are herein complained of are not accidental or unintentional on the part of said assessing officers of Clallam County, but that the same are the direct and immediate result of a corrupt and unlawful intent on the part of the County Assessor for the county of Clallam, and the members of the county Board of Equalization of said county, or the majority of said members, to discriminate against the timber land owners in the west end of said county, and particularly against the plaintiffs in the matter of taxation, and in favor of all owners of property in the middle and east districts of the county, and unjustly and illegally to overvalue the property of the plaintiffs for purposes of taxation and to undervalue, for the purposes of taxation, other lands and properties within said County of Clallam, including all property situate in Port Angeles or the vicinity thereof, all farming properties in the east end of said County of Clallam and all other properties, real or personal, in the middle and east districts, as well as certain other timber lands in said county situate within the zone lying immediately upon the straits, as set forth in paragraph VII of this bill.

XX

The plaintiffs aver that by Section 9112 of Volume 3 of Remington & Ballinger's Annotated Codes and Statutes of Washington, it is provided that all property shall be assessed at not to exceed fifty per cent of its

true and fair value in money; that the true and fair value in money of the lands owned by your plaintiffs and particularly described in Exhibit "A" hereto attached, with the timber standing thereon, does not exceed the sum of $550,000 and did not exceed that sum when the assessments of 1913 and 1914 were made; that under said statute of the state of Washington any assessment of said lands for purposes of taxation at a sum greater than $275,000 is unjust, illegal and void; that the true and fair value in money of the lands so owned by the plaintiffs is known to the assessor of said county of Clallam, as well as to the members of the County Board of Equalization thereof, and was so known at the time of the making of assessment and at the time of the approval thereof by said Board of Equalization; but that, wholly disregarding the duty thus placed upon them by the law to assess said lands at no greater sum than one-half their true and fair value in money, the said Assessor and the said Board of Equalization fraudulently and unlawfully caused the same to be assessed at a sum exceeding by at least 286.95, the 50 per cent of the true and fair value in money of said lands, contrary to the provisions of the statute above specified, and that such over assessment was made and approved by said assessing officers with the fraudulent and corrupt intent of placing upon your orators the burden of an excessive and unjust proportion of the taxes levied and collected within said county of Clallam for said year. The taxes levied for the year 1914 by the officers of Clallam County upon the lands owned by your orators and described in Exhibit "A" amount in the aggregate, to the sum of $14,095. as shown by the tax roll of said county for that year, whereas had such taxes been levied upon the true and fair value in money of the aforesaid lands, the same would not have exceeded the sum of $6905. and your plaintiffs aver that by the fraudulent and unlawful practices of the assessing officers of Clallam County, of which complaint is herein made, there were and are unlawfully, unjustly and fraudulently imposed upon its lands described in Exhibit "A" taxes for the year

1914 to the amount of at least $7190.16 in excess of all taxes which might or could equitably or lawfully be imposed thereon.

XXI

The overvaluation of the lands of plaintiffs and other owners of interior timber, and the undervaluation of other property in said county, of which complaint is herein made, are in pursuance of a definite, settled policy, design and plan, systematically adopted by said assessing officers and practiced for several years last past. The plaintiffs aver that the assessment of the lands of the plaintiffs and other owners of timber lands in the interior of Clallam County at sums which are proportionately much higher than the assessments imposed upon other properties, real and personal, in said county, is and results in an actual fraud upon the plaintiffs, and the said plan so resulting in such fraud upon the plaintiffs was and is arbitrarily and systematically adopted and carried out by the asssessor and members of the County Board of Equalization and by the defendants herein.

XXII

The assessments upon the lands of the plaintiffs were made by the Assessor of said county for the year 1912 at the high, excessive, unlawful and illegal rates herein specified, and upon the unlawful and fraudulent basis herein mentioned. Thereafter the County Board of Equalization met ostensibly to consider and review the asssessment roll. But such review was ostensible, specious and fraudulent in character, the members of the Board having already combined and conspired with said Assessor to make the assessments upon the basis and at the amounts hereinbefore mentioned. The plaintiffs, through their managing officer and attorneys, appeared before the County Board of Equalization when the same was sitting at its regular session in 1912, and protested against said excessive, unjust and unlawful assessments upon its lands. Such protest was both oral and in writing. The protests so made were arbitrarily disregarded and overruled by said Board, and the petition so filed by the plaintiffs

to equalize the assessments and put the assessments on the property of plaintiffs on the same basis as the assessments upon other property in said county, was arbitrarily denied.

XXIII

The assessments upon the lands of the plaintiffs were made by the Assessor of said County for the year 1913, at the high, excessive, unlawful and illegal amounts and rates herein specified and upon the unlawful and fraudulent basis herein mentioned. Thereafter the County Board of Equalization met ostensibly to consider and review the assessment roll, but such review was ostensible, specious and fraudulent in character, the members of the board having already combined and conspired with said Assessor to make the assessments upon the basis and at the amounts hereinbefore mentioned. The plaintiffs, through their attorney, appeared before the County Board of Equalization when the same was sitting at its regular session in 1913, and protested against said excessive, unjust and unlawful assessments upon its lands. The protests so made, both orally and in writing, were arbitrarily disregarded and overruled by said Board, and the petition of the plaintiffs to equalize their assessments and put the same on the same basis as the assessments upon other properties in said County, was arbitrarily and unlawfully denied.

XXIV

The assessments upon the lands of the plaintiffs were made by the Assessor of said county for the year 1914, at the high, excessive, unlawful and illegal amounts and rates herein specified, and upon the unlawful and fraudulent basis herein mentioned. Thereafter the County Board of Equalization met ostensibly to consider and review the assessment roll, but such review was ostensible, specious and fraudulent in character, the members of the Board having already combined and conspired with said Assessor to make the assessments upon the basis and at the amounts hereinbefore mentioned. The plaintiffs, through their attorney, appeared before the County Board of Equaliza-

tion when the same was sitting at its regular session in 1914 and protested against said excessive, unjust and unlawful assessments upon its lands. The protests so made, both orally and in writing, were arbitrarily disregarded and overruled by said Board, and the Petition of the plaintiffs to equalize their assessments and put the same on the same basis as the assessments upon other properties in said County, was arbitrarily and unlawfully denied.

XXV

Thereafter the taxes were extended against the lands of the plaintiffs upon the tax rolls and books of said county, the same being so extended upon the basis of the high, excessive, unlawful and fraudulent assessments upon the lands of these plaintiffs of which complaint is herein made. Said tax rolls and books were delivered to the defendant Herbert H. Wood, Treasurer of said county, and said Herbert H. Wood as such Treasurer has demanded payment of said illegal, fraudulent and arbitrary taxes assessed and levied in manner as hereinbefore specified. The taxes so demanded by said Herbert H. Wood, Treasurer of said county, amount in the aggregate to the sum of $14,095.16 and said Treasurer, unless restrained by the order of this court will sell the property of the plaintiffs to satisfy the taxes thus fraudulently and unlawfully assessed and levied.

XXVI

That upon the 24th day of February, 1915, the plaintiffs tendered and offered to pay to said Herbert H. Wood, Treasurer of Clallam County, and to said Clallam County, the defendants herein, the full and true sum of $6905. lawful money of the United States, in payment of the taxes levied upon their lands in said Clallam County, for the year 1914, which tender was refused and plaintiffs aver that the sum thus tendered is more than the taxes justly and equitably due from the plaintiffs to the defendants upon their lands aforesaid for such year, including all penalties, interest and costs, and more than the full amount which the plaintiffs would be required to pay if their property were

assessed upon the same basis as all other property in Clallam County, or if said assessments were legal and equitable or equal and uniform with or compared to the assessments upon all other property within said county. The plaintiffs bring into court the sum of money in this paragraph specified and tender and offer to pay, and do hereby pay the same to and for the use and benefit of the defendant County of Clallam, and the plaintiffs offer to pay and will pay any such other or further amounts as the court may find to be justly due from them or equitably owing by them to said county of Clallam. And the plaintiffs aver that the taxes upon their said lands for all years prior to 1914 have been paid and that the taxes for the year 1914 have been paid and discharged by the tender and payment herein specified.

XXVII

That prior to the assessment and levy of the taxes complained of herein these complainants under instruments of conveyance conveying to them all of the lands hereinabove described, were in the actual possession and occupation of a portion of said lands for the whole; otherwise said lands are vacant and unoccupied.

XXVIII

That it is the duty of the Treasurer of Clallam County under the law of the state, after receiving the moneys so taxed to pay the sum so received in the proportions designated in his tax books to the various road and bridge funds and to the city of Port Angeles and to the state of Washington and to the various funds for which said taxes are collected and distributed under the law, and to other officers and authorities entitled to receive the same, and if the plaintiffs instituted suit to recover back the taxes so paid to the town of Port Angeles or county, or road, or school districts, they would be obliged to bring suit against each one of the taxing bodies receiving its proportionate share of the tax, thereby necessitating a multiplicity of suits, and the proportion of the tax which would go to the state of Washington could not be collected back by any legal proceeding whatever; and

if repayment could be compelled from the town of Port Angeles and other taxing bodies, such repayment would not cover the costs, including commissions deducted for the collection of the tax, and penalties, and complainants would be subject to great and irreparable injury for which there is not a complete, adequate or any remedy at law.

That the Treasurer of Clallam County is required under the law upon the delinquency of said taxes, to immediately issue delinquent certificates against said lands, under which same are authorized to be sold and would be sold to pay said taxes. The levy and existence of said tax and the threatened issuance of delinquent certificates and sale thereunder constitute a cloud upon plaintiffs' title to said lands and all of them.

XXIX

The plaintiffs aver that by reason of the facts hereinbefore recited, the assessment of the plaintiffs' lands for taxation for the year 1914 is arbitrary, unjust, illegal, and fraudulent, as compared with the assessment of all other property in said Clallam County, and that such unlawful and fraudulent assessment is prohibited by the Constitution of the State of Washington and that the assessment so made is in particular, in violation of and contrary to Section 2, Article VII of the Constitution of the state of Washington, in and by which it is provided that assessments and taxes shall be uniform and equal on all property in said state, according to its value in money, and that there shall be secured a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property, and that the assessment so made is also in violation of and contrary to Section 1 of Article VII of the Constitution of the State of Washington which declares that all property in the state, not exempt under the laws of the United States, or under said state constitution, shall be taxed in proportion to its value. And the plaintiffs aver that in truth and in fact the taxes upon their lands, described in Exhibit "A" are

not uniform and equal as compared with all other property in said County of Clallam.

XXX

The plaintiffs aver that if the assessment and levy of taxes for the year 1914 upon their lands in Clallam County hereinbefore described be not set aside, vacated and held for naught, the same will result in the taking of their property without due process of law, and in denying to them the equal protection of the laws, contrary to the provisions of the XIVth Amendment to the Constitution of the United States, which provides that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. And the plaintiffs pray the protection afforded by said XIVth Amendment to the Constitution of the United States, and aver that this suit arises under the Constitution and Laws of the United States, and that for this reason, as well as because of the diverse citizenship of the parties, this Court has jurisdiction thereof.

XXXI

The plaintiffs are remediless at and by the strict rules of the common law, and are relievable only in a court of equity, where matters of this sort are properly cognizable and relievable.

XXXII

The plaintiffs therefore ask the aid of this Court in the premises and pray:

(a) That the County of Clallam, a municipal corporation and Herbert H. Wood, Treasurer of said county, answer this bill without oath, answer under oath of said defendants being hereby expressly waived.

(b) That this court decree that the assessments and taxes for the year 1914, imposed by the assessing and taxing officers of the County of Clallam upon the lands of the plaintiffs are unlawful, fraudulent and void; that the same are contrary to and in violation of the Constitution and Laws of the State of Washington and the provisions of the 14th Amendment to the Constitution of the United States.

(c) That this Court determine and decree what sums were or are justly owing by the plaintiffs for the taxes for the year 1914 upon their lands in Clallam County, described in Exhibit"A" hereto attached, and what assessments and taxes upon their lands are equal and uniform with or compared to the assessments and taxes upon all other property in said County.

(d) That it be determined and decreed that the sum of $6905 tendered by the plaintiffs to said defendants is sufficient to pay all sums which were or are justly and equitably owing by the plaintiffs for the taxes for the year 1914 upon their lands in said County of Clallam, described in said Exhibit "A".

(e) That said defendants, and each of them, be permanently enjoined and restrained from attempting to collect for the taxes for the year 1914 any sum or sums whatever in addition to those already tendered, and from selling or attempting to sell the lands or property of the plaintiffs, or any part thereof, to satisfy said taxes so levied for the year 1914 upon their lands in Clallam County, and that the cloud upon the title of the plaintiffs to their said lands which exists because or by reason of such unjust, illegal and fraudulent taxes so levied be forthwith removed and cancelled.

(f) That said defendants, and each of them, be in like manner enjoined until the further order of this Court.

(g) That such other or further order or decree be made in the premises as the nature of the case may require, and as to the Court shall seem meet.

XXXIII

May it please your Honor to grant unto the plaintiffs the writ of injunction to be issued out of and under the seal of this Court in due form of law, permanently enjoining and restraining said defendants County of Clallam and Herbert H. Wood, Treasurer of said County, and each of them from attempting to collect for the taxes of the year 1914 any sum or sums whatsoever in addition to those already tendered by the plaintiffs, and from selling or attempting to sell the lands or property of the plaintiffs or any part

thereof, to satisfy said taxes so levied for the year 1914 upon their lands in Clallam County; and that a writ of injunction be issued enjoining and restraining the defendants and each of hem in like manner as herein prayed, uniil the further order of this Court.

XXXIV

May it please the Court the promises being considered to grant unto the plaintiffs the writ of subpoena to be issued out of and under the seal of this Court, directed to said County of Clallam, a municipal corporation, and Herbert H. Wood, Treasurer of said County of Clallam, commanding them and each of them to appear before this Court at a date therein specified and answer this bill of complaint, and plaintiffs will ever pray, etc.

CHARLES H. RUDDOCK and
TIMOTHY H. McCARTHY,
Plaintiffs.

By DAN EARLE.
PETERS & POWELL,
EARLE V. STEINERT,
Attorneys for Plaintiffs.

UNITED STATES OF AMERICA,
COUNTY OF KING, STATE
OF WASHINGTON—ss.

On this 6th day of March, 1915, before me, a Notary Public in and for the State of Washington, personally appeared Dan Earle, to me known to be the person who subscribed the foregoing Bill of Complaint in complainants' behalf, who made oath and says that he subscribed the name of complainants to said Bill of Complaint; that he is properly authorized to do so; that he is the Attorney of said complainants; that he has read the Bill of Complaint by him subscribed and knows the contents thereof, and that the same is true of his own knowledge except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

(Seal) VOLNEY P. EVERS,
Notary Public in and for the State of Washington, residing at Seattle.

EXHIBIT "A"

TOWNSHIP 28 NORTH, RANGE 14 WEST

Section 1 Lot 2
" " 3
" " 4
" " 5
" " 6
" " 7
" " 8
" " 9
" " 11
" " 12
" " 13
" S½ of NE¼
" NW of SE
" SW½ of SE½
" S½ of SW¼
Section 2 Lot 5
" " 6
" " 7
" S½ of NE¼
" NW¼ of SE¼
" SW¼ of SE¼
" NE¼ of SW¼
" SE¼ of SW¼
Section 10 S½ of NW¼
" NE of SW¼
11 Lot 1
" " 2
" " 4
" " 5
" " 6
" " 10
" " 11
" " 12
" " 13
" " 14
" N½ of NW¼
" " 12 SW¼ of NW¼
Section 12 Lot 1
" " 2

" " 3
" " 4
" " 5
" N½ of NW¼
" NW¼ of SE¼
" N½ of SW¼
" SW¼ of SW¼
Section 13 Lot 1
" " 2
" " 3
" " 4
" " 5
" " 6
" " 7
" " 8
" " 9
" " 14
" NW¼ of NW¼
" SW¼ of NW¼
" SW¼ of SE¼
Section 14 Lot 1
" " 3
" " 5
" " 6
" NE¼
" NE¼ of NW¼
" SE¼ of NW¼
" N½ of SE¼
Section 15 Lot 1
" " 10
" " 12
" " 13
" SE¼ of SE¼
Section 23 Lot 1

TOWNSHIP 28 NORTH, RANGE 13 WEST

Section 3 Lot 2
" " 5
" " 6
" SW¼ of NW¼
" NW¼ of SW¼ except 2 acres
Section 4 Lot 1

" " 5
" " 6
" N½ of SE¼
Section 5 Lot 1, except right-of-way
" " 2, except right-of-way
" " 3
" " 4
" " 5
" " 6
" " 7
" S½ of NE¼
" S½ of NW¼
" NE¼ of SW¼
Section 6 Lot 1
" " 2
" " 3
" " 4
" " 5
" " 6
" " 8
" " 9
" S½ of NE¼
Section 7 Lot 6
" " 10
Section 8 " 1
" " 2
Section 18 SW¼ of NE¼
" SE¼ of NW¼
Section 28 SE¼ of SE¼
Section 33 NE¼ of NE¼
" Lot 1
" " 5

TOWNSHIP 29 NORTH, RANGE 13 WEST

Section 19 SE¼ of SE¼
Section 20 S½ of SE¼
" NW¼ of SW¼
21 Lot 4
" NW¼ of SW¼ except right-of-way
" SW¼ of SW¼ except right-of-way
Section 22 SW¼ of NE¼ except right-of-way
Section 22 SW¼ of NE¼ except right-of-way

" NW¼ of SE¼
" SW¼ of SE¼
" NE¼ of SW¼
" SE¼ of SW¼
" Lot 3
Section 27 NW¼ of NE¼
" SW¼ of NE¼
" NE¼ of NW¼
" SE¼ of NW¼
" SW¼
Section 28 Lot 6
" NW¼ of NW¼ except right-of-way
" SW¼ of NW¼ except right-of-way
" S½ of SE¼
Section 29 NE¼
" NW¼
" NE¼ of SE¼ except right-of-way
" NW¼ of SE¼
" N½ of SW¼
" Lot 1, except right of way
" " 2
" " 3
" " 4
" " 7
" " 8
" " 9, except right-of-way
Section 30 SE¼ of NE¼
" N½ of SE¼
" Lot 6
" " 7
" " 8
" " 9
Section 31 N½ of NE¼
" SW¼ of NE¼
" SE¼
" SE¼ of SW¼
" Lot 4
" " 5
" " 6
" " 7
" " 9

Section 32	" 1
	" " 2, except right-of-way
	" " 3
	" " 4
	" " 5
	" NW¼ of NE¼, except right-of-way
	" SE¼ of NE¼
	" SW¼ of NE¼, except right-of-way
	" NE¼ of SE¼
	" NW¼ of SE¼, except right-of-way
	" S½ of NW¼
	" SE¼ of SE¼
	" SW¼ of SE¼, except right-of-way
Section 33	NW¼ of NE¼
	" S½ of NE¼
	" Lot 2
	" SE¼ of NW¼
	" SE¼
Section 34	NW¼ of NE¼
	" SW¼ of NE¼
	" NE¼ of NW¼
	" SE¼
	" SW¼
Section 35	SW¼

EXHIBIT B

Fir	501,293½ M	
Spruce	136,761½ M	
Cedar	301 M	
White Fir	361 M	
Hemlock	76,212¾ M	
		714,929¾ M
Hemlock Poles	25,315	
Fir Poles	2,530	
Spruce Poles	526	
		28,371 Poles
Hemlock Ties	66,072	
Fir Ties	175	
		66,247 Ties

Indorsed: Bill of Complaint. Filed March 6, 1915.

NO. 57

MOTION TO DISMISS PLAINTIFFS' BILL

Come now the defendants in the above entitled action appearing by Sanford C. Rose, County Attorney for Clallam County, Washington, J. E. Frost, C. F. Riddell and Edwin C. Ewing, attorneys for the defendants, and respectfully move the court for an order dismissing the bill of complaint of plaintiffs upon the grounds and for the reasons following:

I

Because the plaintiffs at all times mentioned in their said bill of complaint have had a plain, speedy and adequate remedy under the statutes of the State of Washington.

II

Because it fully appears in plaintiffs' bill of complaint that the matters and things therein alleged and complained of have long been acquiesced in and consented to by plaintiffs and plaintiffs are in equity and good conscience denied from controverting their justice and legality.

III

Because the facts alleged in plaintiffs' said bill of complaint are not in violation of any constitutional or statutory provision nor of any rule or principle of justice or equity, but to the contrary are in compliance with both law and equity.

IV

Because the matters and things alleged in plaintiffs' said bill of complaint are not sufficient to entitle it to the relief prayed for or to any relief whatsoever or to be heard or to maintain an action.

SANFORD C. ROSE,
J. E. FROST,
C. F. RIDDELL,
EDWIN C. EWING.

Indorsed: Motion to Dismiss. Filed March 26, 1915.

IN EQUITY NO. 57
ORDER DENYING DEFENDANTS' MOTION TO DISMISS

This cause coming on to be heard upon the motion of the defendants Clallam County and Herbert H. Wood, Treasurer of said county, to dismiss the bill of complaint of the plaintiffs and the matter having been argued by counsel and submitted to the court said motion to dismiss is overruled and denied.

To which ruling of this court the defendants except and their exception is allowed.

Done in open court this 29th day of March, 1915.

JEREMIAH NETERER, Judge.

Indorsed: Order Denying Motion to Dismiss. Filed March 29, 1915.

In Equity No. 57
ANSWER TO THE BILL OF COMPLAINT.

TO THE HONORABLE JUDGE OF THE ABOVE ENTITLED COURT:

Come now Clallam County, a municipal corporation of the State of Washington, and Herbert H. Wood, Treasurer of said Clallam County, the defendants named in the above entitled action and file this their answer to the bill of complaint of the plaintiffs herein.

I.

With reference to paragraph I of said bill, the defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained, but they are willing to admit the same and not put the plaintiffs to proof thereof.

II.

With reference to paragraph II of said bill, the defendants admit the allegations thereof.

III.

With reference to paragraph III of said bill, the defendants admit the allegations thereof.

IV.

With reference to paragraph IV of said bill, the defendants admit the allegations thereof.

V.

With reference to paragraph V of said bill, the defendants admit the allegations thereof.

VI.

With reference to paragraph VI of said bill, the defendants admit that for the purpose of assessment for taxation and as a basis therefor, the assessing officers of Clallam County have from time to time within the period of five or six years last past caused timber lands in said county to be cruised and the cruises and estimates thus made to be adopted by the county; that most of the timber lands in the county owned by private parties as distinguished from Government lands have now been cruised, and that all the lands owned by the plaintiffs have been so cruised, and that so far as respects timber lands within the county upon which cruises have thus been made, it is claimed by the assessing officers that the same have been assessed upon the basis of the cruises thus obtained; admit that the assessments made by the assesing officers of the county have been made according to certain zones or districts which the assessing officers have laid off; but deny that said zones or district have been laid off and determined arbitrarily, unreasonably or unlawfully, or without reference to and in disregard of the true and fair value in money of timber on the lands within such zones or districts, or in any other manner than fairly, truly, impartially, and as a result of the honest and mature deliberation and judgment of the assessing officers of said county formed upon full information after careful inquiry and investigation.

VII.

With reference to paragraph VII of said bill, the defendants deny that the zone therein referred to was arbitrarily laid off; admit the geographical location of said zone, but deny its dimensions and area as alleged in said paragraph; deny that within this zone are included those timber lands which of all timber lands within the county are of the greatest value; admit that within this zone the timber is valued for

the year 1914, by the assessing officers of Clallam County at the figures set forth in said paragraph; admit that in this and all other zones, in addition to the values placed by the assessing officers upon the timber, there was for the year 1914 placed upon the lands themselves a valuation of $1 to $5 per acre; deny that the same, in the case of the plaintiffs' lands or the lands of any other persons, was done arbitrarily, unreasonably and unlawfully and without any reference to the actual value thereof, or in any other manner than fairly, truly, impartially and according to law; and deny that many or any of the lands of the plaintiffs are of no value whatsoever independent of the timber standing or being thereon.

VIII.

With reference to paragraph VIII of said bill, the defendants deny that the zone therein referred to was arbitrarily, unreasonably and unlawfully laid off by the assessing officers; admit that it lies in the Western part of Clallam County; deny that no part thereof lies nearer to the Straits than approximately four to six miles and that no lands within this zone owned by the plaintiffs lie nearer to the Straits than approximately nine miles and that the great body of the lands owned by the plaintiffs within this zone lie much more distant therefrom; admit the form and extent of said zone as alleged in said paragraph; deny that there are no harbors upon the Pacific Ocean within the counties of Clallam or Jefferson at or through which the timber on the lands of the plaintiffs might or could be brought to market; admit that within this zone there is a large acreage of land and that upon the timber lands within this zone the assessing officers of Clallam County put for the year 1914, for the purpose of taxation, the valuations therein set forth; admit that the plaintiff is the owner of lands and timber to the extent and in the amounts of the figures therein set forth, and that the value of the lands of the plaintiffs within this zone, as fixed and determined by the assessing officers of Clallam County for the year 1914, for the purpose of taxation is as stated therein; deny that all

the lands owned by the plaintiffs within this zone or the other zones or districts set off by said assessing officers are separated from the Straits of Fuca by a range of mountains.

IX.

With reference to paragraph IX of said bill, the defendants deny the practice by assessors and taxing boards of the custom therein referred to, and deny the pursuit of such custom by county assessors and its recognition and acquiescence by the State Board of Equalization; deny that the assessor of Clallam County gives out and pretends that for the year 1914, he assessed taxable property within Clallam County upon the basis of fifty per cent of its true and fair value in money, or upon any other and different basis than that provided by the laws of the State of Washington at the time the assessments for the year 1914 were made; deny that the members of the County Board of Equalization give out and pretend that they equalized and approved the assessments upon the taxable property within said county upon the basis alleged in said paragraph (or upon any other or different basis than that provided by the laws of the State of Washington at the time the assessments for the year 1914 were made); deny that the interior timber lands in said county, including the lands owned by the plaintiffs were and are valued in the year 1914 for the purpose of taxation at sums in excess of fifty per cent of the true and fair value thereof in money; deny that other properties in said county, real and personal, were valued at sums less than fifty per cent of the true and fair value thereof in money; deny that the plaintiffs were discriminated against grossly and intentionally, or at all, by the assessing officers of Clallam County in the matter of the assessment and taxation of their lands for the year 1914.

X.

With reference to paragraph X of said bill, the defendants admit that the timber upon the lands of the plaintiffs, as shown by the cruise made by the county of Clallam, amounts in the aggregate to the

figures set forth therein, and that the assessments upon said lands for the year 1914 were made upon the basis of said cruise; deny that the timber upon the lands of the plaintiffs was over-valued greatly, or at all, by the assessing officers of said county in the valuations put thereon by them for the purposes of taxation in the year 1914; admit that the valuations placed by the assessing officers of said county upon the lands of the plaintiffs for the purpose of taxation for the year 1914 amount to the figures therein set forth, to-wit $561,-395; deny that the true and fair value in money of said lands does not exceed the sum of $500,000, and did not exceed that sum in the year 1914; deny that said assessment for the year 1914 was made upon the basis of 102 per cent (or upon any other or different basis than the true and fair value in money of all the property assessed;) deny that no property in said Clallam County, save the timber lands owned by the plaintiffs and certain other timber lands similarly situated was assessed in said year 1914 at so great a proportion of its true and fair value in money; deny that the assessment upon the lands of the plaintiffs, or upon any other lands or other property in said county, was in pursuance of any combination and conspiracy between the assessor of Clallam County and the other members of the County Board of Equalization of said county, as alleged in said paragraph, or at all.

XI.

With reference to paragraph XI of said bill, the defendants admit the allegations thereof.

XII.

With reference to paragraph XII of said bill, the defendants admit the election of the assessing officers of Clallam County as alleged in said paragraph; deny that the assessing officers of said county have combined and concerted together, wrongfully and corruptly, with the intents and purposes alleged, or for any other intent and purpose, or at all; admit that it has been the custom of the assessor of said county to consult and advise with the other members of the County

Board of Equalization of said county, and with residents of the Middle and West and East Districts of said county in making his assessment rolls, and that such custom was followed in making his assessment roll for the years 1912, 1913 and 1914, but deny that such custom is or was in pursuance of a combination and conspiracy as alleged in said paragraph or at all; deny that the assessment roll does not and did not in the years stated represent the judgment of the assessor, and deny that said roll was and is the result of any combination and conspiracy with the other members of the County Board of Equalization; deny that the assessment roll is approved as a matter of course as relates to assessments on timber lands or otherwise by the County Board of Equalization; deny that no fair hearing is possible to be had on appeal to said Board; deny that the custom alleged in said paragraph or any other similar or unlawful custom has been followed in said county for several years continuously past, or at all; and deny that the plaintiffs were refused a hearing upon appeal to said Board in 1910, as alleged in said paragraph, or at all, or that the conversation between attorney for the plaintiffs and the members of said Board took place at said time or at all, with reference to the futility of introducing evidence as to the value of timber lands.

XIII.

With reference to paragraph XIII of said bill, the defendants deny that at the time therein stated or at any other times, for the reasons or with the intent and purpose therein alleged, or for any other purpose whatsoever, were gross or any discriminations, practiced by the assessing officers of said Clallam County against the plaintiffs or any other persons, or in favor of any other persons, as alleged in said paragraph, or at all.

XIV.

With reference to paragraph XIV of said bill, the defendants allege that they are without knowledge or information as to the examination of the assessment rolls of said county by the plaintiffs, and the

result thereof, and they therefore deny the allegations of said paragraph with regard thereto; deny that the lands and other properties situated at Port Angeles and subject to taxation are valued upon said assessment rolls as equalized for such years at not to exceed 10 to 20 per cent of their true and fair value in money; admit the composition of the County Board of Equalization of Clallam County and the residence of the constituent members thereof as therein alleged, and that the major portion of the population of said county is at Port Angeles; deny that for the purposes therein alleged or for any other purpose, did the three members of said Board resident at Port Angeles, combine and conspire with the Commissioner from the East District, or any other person, against the plaintiffs and other owners of timber lands in the interior of said county, as therein alleged, or against any other person, or at all.

XV.

With reference to paragraph XV of said bill, the defendants allege that they are without knowledge or information as to the examination by the plaintiffs of the assessment rolls of Clallam County for the years 1912, 1913 and 1914 and of the property values within said county, and the results thereof, and they therefore deny the allegations of said paragraph with regard thereto; and deny that the farming lands and other properties situate in the East end subject to taxation are valued upon said tax rolls as equalized for such years at not to exceed 25% to 30% of their true and fair value in money.

XVI.

With reference to paragraph XVI of said bill, the defendants allege that they are without knowledge or information as to the examination by the plaintiff of the assessment rolls of Clallam County for the years 1912, 1913 and 1914 and of property values within said county, and the results thereof, and they therefore deny the allegations of said paragraph with regard thereto; and deny that the personal property within said county described in said paragraph is

valued by the assessing officers of said county for the year 1914 at not to exceed 10% to 15% of its true and fair value in money.

XVII.

With reference to paragraph XVII of said bill, the defendants admit the location of the lands of the plaintiffs as therein stated; deny that said lands are wholly destitute of facilities for transportation, and that it is impossible to bring the timber therefrom into market or that it is necessary that facilities be provided for transportation to Gray's Harbor on the South or the Straits of Fuca on the North; admit that Gray's Harbor is far distant and that no railroad extends further North from that direction than Moclips, and that Moclips is sixty miles from the plaintiff's lands; deny that the lands of the plaintiffs are as distant from the Straits of Fuca as therein stated or that said lands are cut off from the Straits by a range of mountains or that it is impossible to bring the timber from said lands except by transportation across such range of mountains; deny that such transportation is impossible of accomplishment except by the construction of a railroad at great expense, or that such expense is beyond the present means at the command of the plaintiffs or which is prohibitive under the present condition of the lumber market or conditions which have at any time heretofore prevailed, or that the facts alleged in said paragraph have a direct and important bearing upon the present value of the lands of the plaintiffs; admit that upon the Straits of Fuca and immediately adjoining tide water, there lie fine bodies of fir, spruce, cedar and hemlock timber, which can readily be logged to the Straits as stated, and the extensive logging operations now are and for many years have been carried on in that portion of said Clallam County; admit that this Straits timber (so called) is in the zone or district described in paragraph VII of said bill, but deny that said zone was arbitrarily, unreasonably and unlawfully laid off by the assessing officers of said county; admit that in the zones described in said paragraph VII and XVII

the valuations put upon the timber are as stated in said paragraph XVII; and deny that the true and fair value in money of the so called Straits timber is at least twice the true and fair value in money of the timber on the lands of the plaintiffs.

XVIII.

With reference to paragraph XVIII of said bill, the defendants admit the geographical location of Port Angeles as therein stated, and the desires and ambitions of the inhabitants thereof; deny the statements therein imputed to inhabitants of Port Angeles and the Assessor; deny the combination and conspiracy therein alleged or any combination and conspiracy; deny the purposes therein imputed to the assessing officers of said county, and the assurances of influential citizens of Port Angeles therein set forth; deny the ownership of real property in Port Angeles by the majority of the members of the Board of Equalization, and the personal interest and desire of aggrandizement of the members of said Board for the purposes therein imputed or for any other purposes incompatible with their official positions and duties.

XIX.

With reference to paragraph XIX of said bill, the defendants deny that the assessments therein complained of are unequal, discriminating or unlawful, or that they are the result, direct and immediate or otherwise, of any intent, either corrupt or unlawful, or in any wise incompatible with the official positions and duties of said officers, of the County Assessor and the members of the County Board of Equalization of said Clallam County, to discriminate against the plaintiffs or any other persons, or in favor of any persons, either as stated in said paragraph or otherwise, or to undervalue or overvalue the taxable properties in said county for the purposes therein alleged or for any other purposes whatsoever.

XX.

With reference to paragraph XX of said bill, the defendants admit the provisions of paragraph 9112 of Volume 3 of Remington & Ballinger's Annotated Codes

and Statutes of Washington therein referred to; deny that the true and fair value in money of the lands of the plaintiffs therein referred to does not exceed, and did not exceed, when the assessments for 1912, 1913 and 1914 were made, the sum therein stated; deny that under said statute any assessment of lands of the plaintiffs for purposes of taxation at a sum greater than the sum of $275,000 is unjust, illegal and void; admit that the true and fair value in money of the lands owned by the plaintiffs is known to the Assessor of Clallam County and to the members of the said County Board of Equalization, and was so known at the time of the making of said assessment and the approval thereof by said Board; deny that said officers in making and equalizing such assessments disregarded the duty placed upon them by law, and deny that said officers fraudulently and unlawfully caused said lands to be assessed at a sum exceeding by $286,395.00 the 50% of the true and fair value in money of said lands; deny that the assessment of said lands was made and approved by said officers with a fraudulent or corrupt intent, or with any other intent incompatible with their official positions and duties, either as stated in said paragraph or otherwise; admit that the taxes levied for the year 1914 upon the lands of the plaintiffs aggregate the sum therein stated, but deny that had said taxes been levied upon the true and fair value in money of said lands, the same would not have exceeded the sum of $6,905.00; deny that the practices of the assessing officers of said county in the matter of the assessment of the lands of the plaintiffs for the year 1914, or any other year, were fraudulent or unlawful, or in any wise incompatible with the duties of said officers, or that there are or were imposed upon the lands of the plaintiffs for the said year $7190.16 in excess of all taxes which might or could equitably or lawfully be imposed thereon.

XXI.

With reference to paragraph XXI of said bill, the defendants deny either an over valuation of the lands therein referred to, or the under valuation of other

property in said county and the pursuit and practice of the policy therein imputed to the assessing officers of said county, or any other policy incompatible with their official duties, for several years last past, or at all; deny that the assessment of the lands of the plaintiffs and other owners of timber lands in the interior of said county are proportionately higher than the assessments imposed upon other real and personal properties in said county, or that said assessments are or result in an actual or any fraud upon the plaintiffs; deny that any plan resulting in fraud upon the plaintiffs or any other persons was arbitrarily and systematically or otherwise, adopted and carried out by the officers therein referred to or by the defendants herein.

XXII.

With reference to paragraph XXII of said bill, the defendants deny that the assessments upon the lands of the plaintiffs were made by the assessor of said county for the year 1912 at a high, excessive, unlawful and illegal rate as specified in said bill, and upon the unlawful and fraudulent basis therein mentioned; admit that thereafter the County Board of Equalization met to consider and review the assessment roll; deny that such review was ostensible, specious and fraudulent in character; deny that the members of said Board had combined and conspired with the Assessor as therein stated, or at all; admit the appearance and protest of the plaintiffs before said Board at its regular sitting in 1912 as therein stated; admit that the protests of the plaintiffs were overruled by the Board, but deny that the same were arbitrarily disregarded or that the petition of the plaintiffs to equalize their assessment was arbitrarily denied.

XXIII.

With reference to paragraph XXIII of said bill, the defendants deny that the assessments upon the lands of the plaintiffs were made by the assessor of said county for the year 1913 at a high, excessive, unlawful and illegal rate as specified in said bill, and upon the unlawful and fraudulent basis therein mentioned; admit that thereafter the County Board of

Equalization met to consider and review the assessment roll; deny that such review was ostensible, specious and fraudulent in character; deny that the members of said Board of Equalization had combined and conspired with the assessor as therein stated, or at all; admit the appearance and protest of the plaintiffs before said Board at its regular sitting in 1913 as therein stated; admit that the protests of the plaintiffs were overruled by the Board, but deny that the same were arbitrarily disregarded or that the petition of the plaintiffs to equalize their assessment was arbitrarily denied.

XXIV.

With reference to paragraph XXIV of said bill, the defendants deny that the assessments upon the lands of the plaintiffs were made by the assessor of said county for the year 1914 at a high, excessive, unlawful and illegal rate as specified in said bill, and upon the unlawful and fraudulent basis therein mentioned; admit that thereafter the County Board of Equalization met to consider and review the assessment roll; deny that such review was ostensible, specious and fraudulent in character; deny that the members of said Board of Equalization had combined and conspired with the assessor as therein stated, or at all; admit the appearance and protest of the plaintiffs before said Board at its regular sitting in 1914 as therein stated; admit that the protests of the plaintiffs were overruled by the Board, but deny that the same were arbitrarily disregarded or that the petition of the plaintiffs to equalize their assessment was arbitrarily denied.

XXV.

With reference to paragraph XXV of said bill, the defendants admit the extension of the taxes and the delivery of the tax rolls to the Treasurer of Clallam County, but deny that the basis of such extension and such assessment was high, excessive, unlawful and fraudulent as alleged therein; admit that said Treasurer has demanded payment of such taxes as shown by said rolls, but deny that said taxes are illegal, fraudulent or arbitrary; admit that the taxes so demanded

by said Treasurer amount in the aggregate to said sum of $14,095.16, and that said Treasurer, unless restrained by order of this court, will sell the property of the plaintiffs to satisfy such taxes.

XXVI.

With reference to paragraph XXVI of said bill, defendants admit the tender of the amount therein stated, and that the said Herbert H. Wood, as Treasurer of said Clallam County, has refused to accept said tender as payment in full of the taxes upon the lands of the plaintiffs for the year 1914; deny that the sum of money thus tendered is more than the taxes justly due and equitably due from the plaintiffs as therein alleged; deny that the plaintiffs' property was assessed upon any different basis than all the other property within said county or that said assessments were other than legal and equitable, equal to and uniform with the assessments upon all other property within said county; deny that the taxes upon the lands of the plaintiffs for all years prior to 1914 have been paid and discharged; and deny that the taxes for the year 1914 have been paid and discharged by the tender and payment as specified in said paragraph.

XXVII.

With reference to paragraph XXVII of said bill, the defendants admit the allegations thereof.

XXVIII.

With reference to paragraph XXVIII of said bill, the defendants admit the duties of the Treasurer of Clallam County with regard to the disposition of taxes collected by him, as stated therein; deny that if the plaintiffs instituted suit to recover back taxes paid, as alleged in said paragraph, they would be obliged to bring suit against each one of the taxing bodies therein mentioned, and deny that thereby there would be necessitated a multiplicity of suits, and deny that the proportion of the tax going to the State of Washington could not be collected back, or that repayment from the town of Port Angeles would not cover costs and other items referred to therein, or that plaintiffs would thereby be subjected to great and irreparable

injury or that plaintiffs would not have a complete, adequate or any remedy at law; admit the duties of the Treasurer of Clallam County with regard to the issuance of certificates of delinquency as therein alleged; and deny that the levy and existence of the tax therein referred to constitute a cloud upon the title to the lands of the plaintiffs or any of them.

XXIX.

With reference to paragraph XXIX of said bill, the defendants deny that the assessment of the lands of the plaintiffs for the year 1914 is arbitrary, unjust, illegal or fraudulent as compared with the assessment of all other property in said Clallam County, or otherwise, or that said assessment as made by the assessor and assessing officers of said county is prohibited by the Constitution of the State of Washington, or is in violation of paragraphs 1 and 2 of Article VII thereof, as therein alleged, or that the taxes upon the plaintiff's lands are not equal and uniform as compared with all other property in said county.

XXX.

With reference to paragraph XXX of said bill, the defendants deny that if the levy and assessments of taxes upon the lands of the plaintiffs for the year 1914 be not vacated, set aside and held for naught, the same will result in the taking of the property of the plaintiffs without due process of law or in denying to the plaintiffs the equal protection of the laws, or that the same would be a violation of the Fourteenth Amendment to the Constitution of the United States; but admit the jurisdiction of this Honorable Court.

XXXI.

With reference to paragraph XXXI of said bill, the defendants deny that the plaintiffs are remediless at common law or that they are relievable only in a court of equity as therein alleged.

FIRST AFFIRMATIVE DEFENSE.

And for a first further and affirmative defense to the cause of action set forth in the plaintiffs' bill of complaint herein, the defendants allege:

I.

That the true and fair value in money of timber and timbered lands is dependent, among other factors, upon the character and quality or grade of timber, the thickness of the stand of timber or quantity per acre or upon a given tract, the topography of the ground upon which the timber stands, the presence of water for use in camps, logging engines and locomotives, the probability of fires, the size and contiguity of the tracts of land, large or contiguous tracts constituting practically solid bodies of land containing sufficiently large quantities of timber to constitute the same profitable logging enterprises being commercially more valuable per acre or per M feet of timber than smaller or isolated tracts not sufficient in size to warrant the construction or roads, railroads, camps and other facilities necessary to the removal of the timber.

The lands of the plaintiffs, referred to in their bill of complaint herein, consist of such large and practically solid bodies, bearing timber of valuable character, of exceptionally high grade and of thick and heavy stand, and constitute desirable, advantageous and profitable logging enterprises from an operating standpoint, making the same proportionally more valuable than smaller or isolated tracts of timbered lands in the same localities, or otherwise similar in character to the lands of the plaintiffs.

II.

That on or about the year 1908, the assessing officers of Clallam County caused to be employed experienced, capable and competent timber cruisers to make, and who did make, full, complete and detailed cruises and estimates of the character, quality and quantity of the timber standing upon the various legal sub divisions of land in said county. All of the timbered lands in said county in private ownership, including the lands of the plaintiffs, have now been so cruised and platted into tracts or zones, and detailed reports and estimates of such cruises made and filed in the office of the County Assessor of said county respecting the same. These reports, estimates and

plats, taking into due consideration the factors of value hereinabove set forth, and also the availability, ease or difficulty of logging, and physical characteristics of the lands, together with such other information with reference to agricultural possibilities of the lands, the presence of mineral deposits and other similar factors of value as the assessing officers were able to obtain upon independent investigation, were, and have been consulted and used by such officers to assist in ascertaining and determining the values of said lands for the purposes of assessment and taxation, and such facts, plats, estimates, reports, data and other information, with due attention to geographical location, availability, physical characteristics of the ground, and other elements influencing the value of timber and timbered lands, as hereinbefore set forth, were carefully considered by such officers in making the assessments referred to in the plaintiffs' bill of complaint herein.

The assessments thus made, as hereinabove and hereinafter referred to, were not arbitrary, capricious, unlawful, unreasonable, inequitable, disproportionate, or the result of any combination or conspiracy whatsoever, as alleged in the plaintiffs' bill of complaint herein, or at all, but were the result of the honest, sincere, conscientious, mature and deliberate judgment and belief of the assessing officers and equalizing officers of said county formed upon and after full and careful investigation of all the facts and circumstances surrounding said lands and affecting their values, as hereinabove set forth, and a full, free and fair hearing as required by law.

III.

That by the laws of the State of Washington in force and effect at the time the assessment for the years 1912, 1913 and 1914 complained of in plaintiffs' said bill of complaint herein were made, and prior thereto, as hereinafter set forth, it was and is provided:

(Laws of 1897, Chapter LXXX.)

Para. 1. That all real and personal property now

existing, or that shall be hereafter created or brought into this state shall be subject to assessment and taxation upon equalized valuations thereof, fixed with reference thereto on the first day of March at twelve o'clock meridian, in each and every year in which the same shall be listed, and

Para. 2. That real property for the purposes of taxation, shall be construed to be the land itself, and all buildings, structures and improvements, or other fixtures of whatsoever kind thereon, and all rights and privileges thereto belonging or in any wise appertaining, and all quarries and fossils in and under the same, which the law defines, or the courts may interpret, declare and hold to be real property, for the purposes of taxation, and

Para. 3. That all real property in this state subject to taxation shall be listed and assessed under the provisions of this act in the year 1900 and biennially thereafter on every even numbered year with reference to its value on the first day of March preceding the assessment, and that all real estate subject to taxation shall be listed by the assessor each year in the detailed and assessment list and in each odd numbered year the valuation of each trust for taxation shall be the same as the valuation thereof as equalized by the county board of equalization in the preceding year, and

Para. 42. That all property shall be assessed at its true and fair value in money; that the assessor shall value each article or description of property by itself, and at such sum or price as he believes the same to be fairly worth in money at the time such assessment is made; that in assessing any tract or lot of real property, the value of the land, exclusive of improvements, shall be determined; in valuing any property on which there is a coal or other mine, or stone or other quarry, the same shall be valued at such price as such property, including the mine or quarry, would sell at a fair voluntary sale for cash.

IV.

That the assessments of the lands of the plaintiffs, described in their said bill of complaint, based upon

the cruises of timbered lands in said county, as herein set forth, began and were made in the year 1910, and were used and consulted and adopted in 1911 and 1912, and have continued ever since; that the plaintiffs, as alleged in their bill of complaint herein, paid without protest, all of the taxes levied upon its said lands for the years 1910, 1911 and 1912.

V.

That the methods and bases upon which, and the laws of the State of Washington under which, the assessments of timbered lands in Clallam County, including the lands of the plaintiffs, have been made since the year 1910, have at all times since that date, been known to and acquiesced in by the plaintiffs.

VI.

That under the laws of the State of Washington, all taxes for State, County, Municipal and other purposes, are levied in specific sums and charged directly to the respective counties of said state; the rate per centum necessary to raise the taxes so levied in dollars and cents is computed and ascertained by the County Assessor of each county; that after taxes are thus levied, neither the county nor the property therein can be relieved of the duty of the payment of such taxes to be paid by any property owner or tax payer, or to a failure to collect taxes for any reason, are by the laws of said State, required to be added to, made up and collected under future assessments and levies, all of which is known to the plaintiffs.

That the lands of the plaintiffs, as admitted by the allegations of their bill of complaint herein, are not assessed or taxed at any greater or higher value or rate than other timbered lands in said county of similar character or similarly situated to the lands of the plaintiffs, and upon which the taxes and assessments have been paid by the owners thereof.

That under the laws of the State of Washington, county boards and officials are prohibited from and are without authority to remit or grant refunds of taxes paid, all of which is known to the plaintiffs herein; that plaintiffs neglected and delayed to take proper or

any steps or to bring any suit or other proceeding to correct the alleged inequitable assessments referred to in their said bill of complaint herein, until after the larger portion of the taxes levied upon other lands similar in character and similarly located to the lands of hte plaintiffs had been paid, and if relief as prayed for in the plaintiffs' said bill of complaint is granted, other owners of property similar in character and similarly situated to the lands of the plaintiffs in said county, will have been for the year 1914, and in the future will be, compelled to pay an unjust and unfair proportion of the taxes levied upon property in said county.

VII.

That by reason of the premises, and the facts and circumstances hereinabove recited, the plaintiffs have been and are guilty of laches, and are precluded and estopped to question or deny the legality, fairness or correctness of the assessment and levy of taxes upon its said lands for the year 1914, and it cannot, in equity or good conscience, now be heard to complain thereof.

SECOND AFFIRMATIVE DEFENSE.

AND for a second and further affirmative defense to the cause of action set forth in the plaintiffs' bill of complaint herein, the defendants allege:

I.

That they hereby refer to paragraphs I, II, III and IV of their first and further affirmative defense hereinabove set forth, and by such reference adopt the same and make them a part of this second affirmative defense.

II.

That Section 9112 of Volume 3 of Remington & Ballinger's Annotated Codes and Statutes of Washington is unconstitutional, inoperative and void.

WHEREFORE, having fully answered the said bill of complaint herein, the defendants pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained, and for such

other and further relief as to the Court shall seem meet, just and equitable.

CLALLAM COUNTY,
as Treasurer of said county.
HERBERT H. WOOD,
Defendants.
By J. E. FROST,
Their Attorney.

SANFORD C. ROSE,
J. E. FROST,
JONES & RIDDELL,
EDWIN C. EWING,
Attorneys for Defendants.
Office and Post Office Address:
627 Colman Bldg., Seattle, Wash.

Indorsed: Answer to Bill of Complaint. Filed May 3, 1915.

No. 57

STIPULATION REGARDING TRANSCRIPT OF PLEADINGS IN RECORD ON APPEAL

It is stipulated by and between the plaintiffs, appellants, and the defendants, appellees herein, at the instance and request of the plaintiffs, in order to save unnecessary expense of useless repetition in making up the record for appeal herein, as follows, to-wit:

That after the close of the evidence and at the time of argument of this cause the defendants, over the objection of the plaintiffs, under circumstances set forth in the statement of facts herein, were allowed to amend their answer in certain particulars, as defendants contended, to correspond to the evidence in the case, and thereafter, on to-wit the 3d day of February, 1916, defendants served upon the plaintiffs and filed herein their amended answer, with reference to which it is here and now stipulated that said amended answer is the same in all respects as the answer filed herein on the 3d day of May, 1915, save only in the following respects, to-wit:

(A) Paragraph IX was amended to read as follows, to-wit:

"With reference to paragraph IX of said bill, the defendants admit the practice by assessors and taxing boards of the custom therein referred to, and admit the pursuit of such custom by county assessors and its recognition and acquiescence by the State Board of Equalization; deny that the assessor of Clallam County gives out and pretends that for the year 1914, he assessed taxable property within Clallam County upon the basis of fifty per cent of its true and fair value in money; deny that the members of the County Board of Equalization give out and pretend that they equalized and approved the assessments upon the taxable property within said county upon the basis alleged in said paragraph; deny that the interior timber lands in said county, including the lands owned by the plaintiffs were and are valued in the year 1914 for the purpose of taxation at sums in excess of fifty per cent of the true and fair value thereof in money; deny that other properties in said county, real and personal, were valued at sums less than fifty per cent of the true and fair value thereof in money; that the plaintiffs were discriminated against grossly and intentionally, or at all, by the assessing officers of Clallam County in the matter of the assessment and taxation of their lands for the year 1914.

(B) Paragraph X was amended to read as follows:

"With reference to paragraph X of said bill, the defendants admit that the timber upon the lands of the plaintiffs, as shown by the cruise made by the county of Clallam, amounts in the aggregate to approximately 715,000,000 feet, the figures set forth therein, and that the assessments upon said lands for the year 1914 were made upon the basis of said cruise; deny that the timber upon the lands of the plaintiff was overvalued greatly, or at all, by the assessing officers of said county in the valuations put thereon by them for the purposes of taxation in the year 1914; admit that the valuations placed by the assessing officers of said county upon the lands of the plaintiffs for the purpose of taxation for the year 1914 amount to the

figures therein set forth, to wit $561,395; deny that the true and fair value in money of said lands does not exceed the sum of $550,000 and did not exceed that sum in the year 1914; deny that said assessment for the year 1914 was made upon the basis of 102 per cent; that no property in said Clallam County, save the timber lands owned by the plaintiffs and certain other timber lands similarly situated was assessed in said year at so great a proportion of its true and fair value in money; deny that the assessment upon the lands of the plaintiffs, or upon any other lands or other property in said county, was in pursuance of any combination and conspiracy between the assessor of Clallam County and the other members of the County Board of Equalization of said county, as alleged in said paragraph or at all."

(C) Paragraph XII was amended in the following respect:

In the original answer the defendants had admitted "that it has been the custom of the assessor of said county to consult and advise with the other members of the County Board of Equalization of said county and with residents of the Middle and West and East Districts of said county in making his assessment rolls, and that such custom was followed in making his assessment rolls for the years 1912, 1913 and 1914; whereas this is now denied in the amended answer.

(D) Paragraph XVII was amended in the following respect:

In the original answer, paragraph XVII thereof the defendants had admitted the charge in plaintiffs' complaint "that upon the Straits of Fuca and immediately adjoining tidewater there lie fine bodies of fir, spruce, cedar and hemlock timber which can readily be logged to the Straits as stated"; whereas in their amended answer, in paragraph XVII they deny that this Straits timber can be readily logged to the Straits.

(E) There is omitted from the amended answer the following matter pleaded in the original answer by the defendants as a Second Affirmative Defense:

I

"That they hereby refer to paragraphs I, II, III and IV of their first and further affirmative defense hereinabove set forth, and by such reference adopt the same and make them a part of this second affirmative defense.

II

That Section 9112 of Volume 3 of Remington & Ballinger's Annotated Codes and Statutes of Washington is unconstitutional, inoperative and void."

And with this explanation it is stipulated that defendants' amended answer need not be set out in this transcript on appeal.

EARLE & STEINERT,
PETERS & POWELL,
Attorneys for Plaintiff.
EDWIN C. EWING,
C. F. RIDDELL,
Attorneys for Defendants.

Indorsed: Stipulation Regarding Transcript of Pleadings in Record on Appeal. Filed Nov. 6, 1916.

No. 57

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES H. RUDDOCK and TIMOTHY H. McCARTHY,

Appellants

vs.

CLALLAM COUNTY, a municipal corporation and HERBERT H. WOOD, Treasurer,

Appellees

ORDER UPON STIPULATION AS TO RECORD OF TESTIMONY ON APPEAL

It appearing from the stipulation of appellants and appellees, by their respective counsel, herein filed, that in the District Court of the United States for the Western District of Washington, Northern Division, there were therein pending, heard and determined, four causes, being designated as follows:

Clallam Lumber Company, a corporation, plain-

tiff vs. Clallam County, a municipal corporation and Clifford L. Babcock, Treasurer, being Equity Cause No. 36, and the cause of Clallam Lumber Company, plaintiff vs. Clallam County and Herbert H. Wood, Treasurer, being Equity Cause No. 56; and the cause of Charles H. Ruddock and Timothy H. McCarthy, plaintiffs vs. Clallam County, a municipal corporation and Clifford L. Babcock, Treasurer, being Equity Cause No. 37; and the case wherein Charles H. Ruddock and Timothy H. McCarthy are plaintiffs and Clallam County, a municipal corporation and Herbert H. Wood, Treasurer, are defendants, being Equity Cause No. 57; that said four causes were consolidated for trial and were heard, tried and determined by one and the same judge upon the same testimony, evidence and exhibits, and that there was no other or different evidence in the one case than in the other; and it appearing that there was but one and the same decision of the trial judge handed down in the four cases, and that the plaintiffs in the above four cases are seeking to appeal from the judgment or decree rendered and entered in each of said cases to this honorable court; and it appearing that the transcript of the testimony and evidence in these cases is quite voluminous, covering some 700 pages of printed matter, and that the trial court's memorandum of opinion is quite lengthy; now in order to save unnecessary expense upon appeal, it is here

ORDERED that all four of these cases may be presented, heard and determined on appeal, in so far as the evidence, testimony, depositions and exhibits are concerned, upon the record of such to be transcribed, printed and sent up in the case of Clallam Lumber Company, a corporation, plaintiff against Clallam County, a municipal corporation and Clifford L. Babcock, treasurer, defendants, being Equity Cause No. 36 in the trial court, and that the record of the evidence, testimony, depositions and exhibits, and the trial court's memorandum decision, need not be transcribed, printed or served or sent up to the Circuit Court of Appeals in the other three cases, but may be consid-

ered as incorporated in the record on appeal in each of said causes from the record in Equity Cause No. 36 above named.

DATED at Portland, Oregon, this 12th day of December, 1916.

WM. B. GILBERT,
Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

We hereby consent to the rendering and entry of the above order.

Dated at Seattle, Washington, December 11, 1916.

J. E. FROST,
C. F. RIDDELL,
EDWIN C. EWING,
Counsel for Appellees.

EARLE & STEINERT,
PETERS & POWELL,
Attorneys for Appellants.

Indorsed: Filed in U. S. District Court Dec. 13, 1916.

No. 57

DECREE

The above entitled cause having come on duly and regularly for trial before the undersigned Judge of the United States District Court, the plaintiffs appearing by their attorneys, F. W. Keeney, Esquire, Messrs. Earle & Steinert and Messrs. Peters & Powell, and the defendants appearing by Mr. Sandford C. Rose, Prosecuting Attorney for Clallam County, and by their attorneys, J. E. Frost, Edwin C. Ewing and Jones & Riddell, and there being at issue and ready for trial three other causes now on file in this court, involving substantially the same issues and requiring substantially the same testimony, and counsel for all parties hereto, with the consent of the Court, having stipulated that all the testimony introduced insofar as applicable should be considered upon the one trial as having been introduced in each of said causes, the said causes being this cause and cause number 37 in this court, between the same parties, and causes numbered 36 and 56 in this court, in which Clallam Lum-

ber Company, a corporation, is plaintiff, and Clallam County and its Treasurer, in his official capacity as such officer, are defendants; and all parties having introduced testimony and rested, and respective counsel having orally argued this cause to the Court, and having submitted their briefs to the Court, and the Court having considered the same and after full consideration of all the facts and the law, being now duly and fully advised in the premises.

It is hereby ORDERED, ADJUDGED AND DECREED that the above entitled cause be and the same hereby is dismissed with prejudice, and that plaintiffs take nothing by this cause.

It is further ORDERED, ADJUDGED AND DECREED that all the taxes levied for the year 1914 upon the real property described in the complaint herein, are in all things legal and valid and are due and owing to Clallam County, a municipal corporation of the State of Washington.

It is further hereby ORDERED, ADJUDGED AND DECREED that the above named defendant Clallam County, a municipal corporation of the State of Washington, do have and recover of and against the above named plaintiffs, Charles H. Ruddock and Timothy H. McCarthy, and each of them, a joint and several judgment for its taxable costs and disbursements herein, which are hereby taxed in the sum of Twenty-one Dollars and Ninety Cents ($21.90), for which said sum let execution issue.

To the dismissal of this cause, and to each separate paragraph of this decree and to the signing and entry of this decree, the above named plaintiffs except and their exception is hereby allowed by the Court.

Done in open court this 3d day of Feb., 1916.

EDWARD E. CUSHMAN,
District Judge.

Indorsed: Decree. Filed February 3, 1916.

No. 57
ORDER ON EXCEPTIONS TO AMENDED ANSWER OF THE DEFENDANTS

The defendants upon the conclusion of the evidence in this cause on the 10th day of December, 1915, obtained permission from the Court to amend their answer herein so as to conform to the proofs, which permission was then granted over the objection of the complainant, to which the plaintiffs excepted and said exception was then allowed.

The application of the defendants now made to file herein a formal second amended answer embodying these proposed amendments, is now allowed over the objection of the complainants to which exception is reserved by the complainants and said exception is here and now allowed.

Referring to paragraph IX of said amended pleading complainants except to the amendment which now reads:

"Defendants admit the practice by assessors and taxing boards of the custom therein referred to and admit that the pursuit of such custom by county assessors and its recognition and acquiescence by the State Board of Equalization."

whereas in their former answer they had specifically denied these matters.

And referring to line 2 on page 5 in said paragraph IX the defendants now omit the following allegation which appeared in the former answer:

"Or upon any other or different basis than that provided by the laws of the State of Washington at the time the assessments for the year 1914 were made."

And referring to said paragraph IX, page 5, line 4 thereof, defendants now allege the following:

"Deny that the interior timber lands in said county including the lands owned by the plaintiffs were and are valued in the year 1914 for the purpose of taxation at sums in excess of fifty per cent of the true and fair value thereof in money";

whereas they previously admitted such matter.

II

And referring to paragraph X of said amended answer the defendants now omit the following allegation, at page 6, line 2, which appeared in the former answer:

"Or upon any other or different basis than the true and fair value in money."

III

Referring to paragraph XII of said amended pleading, complainants except to the amendment which now reads, at line 22, page 6:

"Deny that it has been the custom of the assessor of said county to consult and advise with the other members of the County Board of Equalization of said county, etc."

whereas in their former answer, they admitted such allegation.

IV

Referring to paragraph XVII, page 10, line 3 thereof, the defendants now allege in said amended pleading:

"But deny that the same can be readily logged to the Straits as stated."

V

In defendants' former pleading they alleged as a second affirmative defense that Sections 9112 of Volume III of Remington & Ballinger's Codes and Statutes of Washington was unconstitutional, inoperative and void, whereas they now exclude this from their amended pleading.

Complainants' objection is based upon the ground that such amendments are not consistent with the proofs and are wholly inconsistent with the pleading upon which the case was tried, and with the position taken by the defendants throughout the trial.

Complainants' exceptions to each of the amendments to the answer in each of the above particulars, are hereby allowed, such exceptions to be entered as of February 3, 1916.

EDWARD E. CUSHMAN,
Judge.

Indorsed: Exceptions to Amended Answer of Defendants. Filed February 24, 1916.

No. 57

PETITION TO REHEAR AND TO MODIFY JUDGMENT

Come now the plaintiffs, Charles H. Ruddock and Timothy H. McCarthy, and respectfully pray this court to grant a rehearing herein, in this:

I

The court erred in sustaining the assessment by Clallam County of the hemlock timber and hemlock ties of the plaintiffs in any sum whatsoever, for the reason that it appeared from the evidence in the entire record that this timber and these ties were of no appreciable market value at the dates of the assessment, nor at any time covered by the facts of this case. The court therefore should have struck such assessment of the plaintiffs out, whether the plaintiffs had made a case of fraud upon the entire issue or not, since a court of equity having acquired jurisdiction, on the grounds of fraud, would retain it to do equity to the plaintiffs, even if the plaintiffs failed in sustaining charges of fraud.

Simkins A Federal Equity Suit, p. 27.
Griswold vs. Hilton, 87 Fed. 257.
Waite vs. O'Neill, 34 L. R. A. 550, 76 Fed. 408.
Shainwald vs. Lewis, 69 Fed. 492.

II

The plaintiffs respectfully pray the court to modify the judgment and decree by charging the plaintiffs or the plaintiffs' lands with interest at six per cent per annum from the date of delinquency of taxes, instead of the statutory rate, in view of the plaintiffs' good faith in bringing this suit and in the prosecution of the same, and on the ground of its being an unnecessary hardship to penalize the plaintiffs with so high a rate of interest under the circumstances.

Respectfully submitted,

PETERS & POWELL,
EARLE & STEINERT,
Attorneys for Plaintiffs.

United States of America,
State of Washington, ss.
County of King.

Dan Earle being first duly sworn, on oath says: That he is one of the attorneys for the plaintiffs in the above entitled cause and makes this verification on its behalf for the reason that said plaintiffs are not within the Western District of Washington; that he has read the foregoing Petition for Rehearing and to Modify Judgment, knows the contents thereof and believes the same to be true.

DAN EARLE.

Subscribed and sworn to before me this 3rd day of March, 1916.

(Seal) ROBERT W. REID,
Notary Public in and for the State of Washington, residing at Seattle.

Indorsed: Petition to Rehear and to Modify Judgment. Filed March 3, 1916.

No. 57
HEARING—JOURNAL ENTRY

Now on this day this cause comes on for hearing on motion for rehearing or review, the Plaintiffs being represented by Peters & Powell and D. Earle, and the Defendants represented by C. F. Riddell, and the Court after hearing argument of respective counsel takes the said matter under advisement.

Dated April 18, 1916.
Equity Journal 1—Page. 125.

No. 57
MEMORANDUM DECISION ON PETITION FOR A RE-HEARING
FILED MAY 11, 1916.

Peters & Powell,
Earle & Steinert, For Plaintiffs.
Jones & Riddell, For Defendants.
J. E. Frost,
E. C. Ewing,
CUSHMAN, District Judge.

Insofar as the petition for a re-hearing is aimed at the assessment as affected by the hemlock valuation, all that can be said is thatcertain phases of the evidence—particularly that of some of defendants' witnesses—are more favorable to plaintiffs as to the overvaluation of the hemlock than that covering the valuation of the fir, spruce and cedar; but, after all is said, it is only a question of overvaluation and, in any event, it is not so palpably excessive as to warrant a finding of fraud.

The cases relied upon by the plaintiffs are not cases of overvaluation, but uniformly involve some other controlling element as: fraud; the adoption of a fundamentally wrong principle; an erroneous system; mistake of law or such palpably excessive overvaluation as to impute fraud.

As to the question of interest on the unpaid and untendered taxes, the laws of Washington provide:

"Hereafter no action or proceeding shall be commenced or instituted in any court of this state to enjoint * * * the collection of any taxes * * *, unless the person or corporation desiring to commence or institute such action or proceeding shall first pay, or cause to be paid, or shall tender to the officer entitled under the law to receive the same, all taxes, penalties, interest, and costs justly due and unpaid from such person or corporation on the property * * *". (Sec. 955 Rem. & Bal. Code.)

"The county treasurer shall be the receiver and collector of all taxes extended upon the tax-books of the county, whether levied for state, county, school, bridge, road, municipal or other purposes, and also of all fines, forfeitures or penalties received by any person or officer for the use of his county. All taxes upon real property made payable by the provisions of this act shall be due and payable to the treasurer as aforesaid on or before the thirty-first day of May in each year, after which date they shall become delinquent, and interest at the rate of fifteen per cent per annum shall be charged upon such unpaid taxes from the date of

delinquency until paid." (Sec. 9219 Rem. & Bal. Code.)

It may be conceded that this suit was brought in entire good faith; that plaintiffs' only remedy was in equity and not at law and that the fifteen per cent. interest charged upon the taxes is a penalty, yet I find no warrant therein given the court to set aside a statute passed to safeguard the sources of the state's revenues.

Re-hearing denied.

Indorsed: Memorandum Decision on Petition for a Rehearing. Filed May 11, 1916.

No. 57

ORDER DENYING PETITION FOR REHEARING

A petition for rehearing having been filed by the plaintiff in the above entitled cause, briefs having been submitted thereon, and the court having considered the same; and the court having on the 11th day of May, 1916, filed its memorandum decision herein on said petition for rehearing;

Now, therefore, it is hereby ordered that said petition for rehearing be and the same hereby is denied. To the denial of said petition and to the entry of this order plaintiff excepts and exception is hereby allowed.

Done in open Court this 15th day of May, 1916.

EDWARD E. CUSHMAN,
United States District Judge.

Indorsed: Order Denying Petition for Rehearing. Filed May 15, 1916.

In Equity No. 57

ORDER AS TO SETTLEMENT OF STATEMENT OF FACTS

This matter coming on now to be heard before the Hon. E. E. Cushman, Judge, upon the consideration and settlement of the statement of facts herein on appeal, proposed by the plaintiffs, the plaintiffs being present and represented by their counsel, Peters & Powell, and the defendants being present and repre-

sented by their counsel, C. F. Riddell, Esq., and it being now represented to the court by both parties that the statement as proposed by the plaintiffs and lodged by them with the clerk of this court on the 1st day of September, 1916, and the amendments thereto and alterations thereof proposed by the defendants and lodged with the clerk of this court on the 20th day of October, 1916, as now checked and corrected by said parties, constitute a true and complete statement of all of the evidence and testimony introduced upon the trial of the above entitled cause, essential to a decision of the questions presented upon the appeal of said cause, together with all exceptions taken and objections made to the admission or exclusion of evidence, and all motions and rulings thereon made upon said trial, and that same contains all the evidence given or offered upon said trial and all the material matters occurring therein not already a part of the record herein; and it being stipulated by said parties in open court that said statement as so amended may be reduced to printed form and in such form may be approved, signed and certified by this court as a true, complete and properly prepared statement on appeal and may thereupon be filed herein as of this date,

IT IS HERE AND NOW ORDERED that the foregoing disposition of the matter is hereby consented to and made by this court.

Done in open court this 27th day of October, 1916.

EDWARD E. CUSHMAN,

Judge.

Indorsed: Order Settling Statement of Facts on Appeal. Filed October 27, 1916.

NO. 57

ASSIGNMENT OF ERROR ON APPEAL

Now on this 27th day of October, 1916, come the plaintiffs, Charles H. Ruddock and Timothy H. McCarthy, by their solicitors, Earle & Steinert and Peters & Powell, and say that the Decree entered in the above entitled cause on the 3d day of February, 1916, is

erroneous and unjust to the plaintiffs, for the following reasons:

I

Because the Court overruled the objection of the plaintiffs to the following question asked by the defendants' counsel on cross examination of the witness, Thomas Aldwell, a witness for the plaintiffs on the value of the Olympic Power Company's plant:

"Do you know what the general impression in Port Angeles and other places was concerning your dam at that time?"

To this plaintiffs objected. The objection was overruled, and the witness answered (Plaintiffs reserving and being allowed an exception):

"I think around Port Angeles they were very optimistic."

"Q. (By defendant's counsel) In other words the general impression was that your dam and power site was a failure up there?"

To this the plaintiffs objected as being incompetent, irrelevant and immaterial. The objection was overruled, an exception taken and allowed by the Court.

To which question the witness answered substantially that the general impression was that the dam would not hold.

II

Because the Court overruled the objection of the plaintiffs to the following question asked by the defendants' counsel on cross examination of the witness Aldwell, a witness for the plaintiffs as to the value of town lots in Port Angeles in March of 1913 and 1914;

The witness was asked whether he was not willing to sell some fifty or sixty thousand dollars worth of Port Angeles property that he had for double its assessed value, to which the plaintiffs objected as incompetent. The objection was overruled and an exception allowed. The witness answered that he would sell the property at double its assessed value.

This holding of the Court was error.

III

Because the Court erred in admitting the testi-

mony of the defendants' witness, C. M. Lauridsen under the following circumstances:

The witness Lauridsen was called by the defendants as an expert upon the value of real estate in Port Angeles and was asked to point out upon a memorandum or tabulation of certain lots what ones he said he would sell on the first of March, 1914, for their assessed value. This was objected to by plaintiffs on the ground that it was incompetent, irrelevant and not evidence of the market value of the property. This objection was overruled by the Court, an exception taken by plaintiffs and allowed by the Court.

The witness answered that the property described was upon the last two sheets of this memorandum or tabulation of lots, being Defendants' Exhibit 29.

IV

Because the Court overruled the objection of the plaintiffs to the following question put by defendants' counsel to their own witness, C. M. Lauridsen, who was being examined as an expert upon the value of real property in the town of Port Angeles:

"Q. That property, according to Mr. Ware's testimony was worth $6000. on the first of March, 1914. Will you state what you paid for it?

A. I paid $2500. on the 13th of March of that same year."

To which ruling the plaintiffs excepted and their exception was allowed by the Court.

V

Because the Court overruled the objection of the plaintiffs to the following question put by the defendants to their witness, C. M. Lauridsen:

"Q. State the facts about the purchase of Lots 18 in Block 54 and Lots 7 and 14 in Block 172".

To which the witness answered:

"Lot 18 in Block 54 I bought in January for $300. Lot 7 and 14 in Block 172, the witness says he purchased for $175.

To which ruling the plaintiffs excepted and their exception was allowed by the Court.

VI

Because the Court erred in sustaining the objection of the defendants to the following question put by the plaintiffs to one of the defendants, Clifford L. Babcock:

"Q. Again in section 18 of your answer you say "Deny that the lands and other properties situated at Port Angeles and subject to taxation and valuation upon the assessment rolls as equalized for such years, were valued at not to exceed 10 to 20 per cent. of their true and fair value in money". Could you state then what you had in mind at that time as the rate at which they were assessed?

To which ruling the plaintiffs excepted and their exception was allowed by the Court.

VII

Because the Court, after the conclusion of all the evidence, permitted the defendants to amend their amended answer, in the following particulars, to wit:

(a) In paragraph IX of their first amended answer the defendants had denied the existence of the practice amongst assessors of the various counties and particularly Clallam County, of assessing property at from 35 to 50 per cent. of its true value, and had denied the recognition of such custom or practice by the State Board of Equalization.

In said second amended answer they *"Admit* the practice by assessors and taxing boards of the custom therein referred to and admit the pursuit of such custom by the County Assessors and its recognition and acquiescence by the State Board of Equalization" meaning thereby the custom of county assessors of assessing property at from 35 to 50 per cent. of its true value.

(b) In their former answer paragraph IX thereof, they had "Denied that the Assessor of Clallam County gives out and pretends that for the year 1914, he assessed taxable property within Clallam County upon the basis of 53 per cent. of its true and fair value in money, *or upon any other or different basis than that provided by the laws of the State of Washington at*

the time the assessment for the years 1913 and 1914 were made".

In their second amended answer, paragraph IX thereof they omit all of that portion above italicized.

(c) In their first amended answer, paragraph IX, the defendants had plead as follows:

"Admit that the interior timber lands in said county including the lands owned by the plaintiffs, were and are valued in the year 1914 for the purposes of taxation, at sums in excess of 53 per cent. of the true and fair value thereof in money."

In their second amended answer, paragraph XIII, they deny this allegation.

To this amendment plaintiffs objected at the time but said objection was overruled and an exception allowed by the Court.

VIII

Because the Court allowed the defendants, over the objection of the plaintiffs then made at the conclusion of the evidence, to amend their answer in the following particulars:

(a) In their first amended answer defendants had alleged in paragraph X thereof the following:

"Deny that said assessment for the year 1914 was made upon the basis of 102 per cent *or upon any other or different basis than the true and fair value in money of all property assessed."*

Whereas the second amended answer contains the same denial omitting however the words above italicized.

Plaintiffs reserved an exception to this amendment at the time, which was allowed by the Court.

(b) In their first amended answer, in paragraph XVII thereof, the defendants had alleged "That in the zones abutting upon the Straits of Fuca there lie fine bodies of fir, spruce, cedar and hemlock timber which can readily be logged to the Straits as stated", while in their second amended answer they deny that said timber can readily be logged to the Straits as stated.

To this amendment and to the allowance thereof

the plaintiffs at the time reserved an exception, which was allowed by the Court.

IX

Because the Court erred in decreeing that the taxes for the year 1914 upon the real property of the plaintiffs described in the complaint, being to wit, in the sum of $14095.67 (or in any sum in excess of $6905.00) were legal and valid.

X

The Court erred in adjudging and decreeing the bill of the Plaintiffs dismissed and a judgment against the plaintiffs for costs.

XI

Because the Court erred in failing to adjudge and decree that the just and equitable amount to be taxed to the plaintiffs' lands set forth in their bill, was not in excess of $6905. and that the plaintiffs had tendered this amount, and that the County of Clallam and the Treasurer thereof should be required to accept this amount in full payment for the taxes upon the property described in the bill of complaint, levied for the year 1914 and that the balance of the taxes levied upon said lands should be cancelled and the defendants enjoined from selling said lands for said taxes.

XII

Because the Court erred in its decree in failing to find and decree that the taxes assessed and levied for the year 1914 against the lands of the plaintiffs, in the sum of $14095.67 were grossly in excess of the true and just assessment against said lands for said year, and was the result of fraud and conspiracy on the part of the assessor and Board of Equalization of Clallam County.

XIII

Because the Court erred in refusing to readjust and fix said assessment at a fair and just amount and permit the plaintiffs to pay said amount with the credit of $6905. tendered by the plaintiffs, and to cancel from said lands the balance of said taxes.

XIV

Because the Court erred, under the evidence, in

failing to eliminate the assessments on hemlock timber, ties and poles and in failing to cut down the amount of the tax levy as provided in the decree by at least the sum of $892.79.

XV

Because the evidence showed that the allegations of the complaint were true and that the allegations of the second amended answer were not true.

XVI

Because the Court erred in entering judgment that the plaintiffs take nothing by this action and that the defendants go hence without day and recover their costs.

XVII

Because the Court erred in not entering judgment for the plaintiffs and against the defendants in accordance with the prayer of the complaint.

XVIII

Because the evidence showed that the plaintiffs' lands set out in the bill of complaint were assessed by Clallam County for the year 1914 taxes in the sum of $14095., whereas the just and fair assessment of such lands did not exceed the sum of $6905.00, and that this over-assessment was the result of fraudulent conspiracy and discrimination on the part of the assessing and taxing authorities of Clallam County as against the plaintiffs and other timber lands, and in favor of other classes of property in the said Clallam County, and that said fraudulent conspiracy had been carried on and persisted in by said officers for a number of years prior to the time of such assessment.

Wherefore plaintiffs pray that such judgment be reversed and that this Honorable Court will direct the entry of a judgment or decree in accordance with the prayer of plaintiff's complaint.

EARLE & STEINERT,
PETERS & POWELL,
Attorneys for Plaintiffs.

Indorsed: Assignments of Error on Appeal. Filed October 27, 1916.

No. 57

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

CHARLES H. RUDDOCK and TIMOTHY H. McCARTHY,

Plaintiffs,

vs.

CLALLAM COUNTY, a municipal corporation and HERBERT H. WOOD, Treasurer,

Defendants.

IN EQUITY

No. 57

PETITION FOR APPEAL

Filed Oct. 27, 1916, in the District Court of the United States for the Western District of Washington, Northern Division.

TO THE HONORABLE EDWARD E. CUSHMAN, DISTRICT JUDGE:

The above named plaintiffs, feeling themselves aggrieved by the decree made and entered in this cause, on the 3rd day of February, 1916, and, after motion for re-hearing, upon the 16th day of May, 1916, do hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignments of Errors, which is filed herewith, and pray that their appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, and your petitioners further pray that the proper order touching the security to be required of them to perfect their appeal may be made.

EARLE & STEINERT,
PETERS & POWELL,
Solicitors.

The petition granted and the appeal allowed upon

giving bond conditioned as required by law in the sum of Five Hundred Dollars.

EDWARD E. CUSHMAN,
Judge of said Court sitting in the Northern Division.

Dated at Seattle Oct. 27, 1916.

Indorsed: Petition for Appeal. Filed Oct. 27, 1916.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

CHARLES H. RUDDOCK and TIMOTHY H. McCARTHY,

Plaintiffs,

vs.

CLALLAM COUNTY, a municipal corporation and HERBERT H. WOOD, Treasurer,

Defendants.

IN EQUITY

No. 57

BOND ON APPEAL

KNOW ALL MEN BY THESE PRESENTS:

That we, Charles H. Ruddock and Timothy H. McCarthy, as principals, and Massachusetts Bonding and Insurance Company, as surety, acknowledge ourselves to be jointly indebted to the county of Clallam and Herbert H. Wood, treasurer, appellees in the above entitled cause, in the sum of Five hundred ($500.00) Dollars, conditioned that,

Whereas, on the 3rd day of February, 1916, and, after petition for re-hearing thereon, on the 16th day of May, 1916, in the District court of the United States for the Western district of Washington, in a suit depending in that court, wherein Charles H. Ruddock and Timithoy H. McCarthy were plaintiffs and Clallam county and Herbert H. Wood were defendants, numbered on the Equity docket as 57, a decree was rendered against the said Charles H. Ruddock and Timothy H. McCarthy, and the said Charles H. Ruddock and Timothy H. McCarthy, having obtained an appeal to the Circuit Court of Appeals

of the United States for the Ninth Circuit, and filed a copy thereof in the office of the clerk of court, to reverse the said decree, and citation directed to the said county of Clallam, and to the said Herbert H. Wood, treasurer, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the city of San Francisco, in the State of California, on the 26th day of November, 1916, next.

Now, if the said Charles H. Ruddock and Timothy H. McCarthy shall prosecute their appeal to effect and shall answer all costs, if they fail to make their appeal good, then the obligation to be void, else to remain in full force and virtue.

CHARLES H. RUDDOCK,
By W. A. Peters, his attorney.
TIMOTHY H. McCARTHY,
By W. A. Peters, his attorney.
MASSACHUSETTS BONDING
AND INSURANCE COMPANY,
(SEAL) By Fredk. B. Potwin, Its Attorney in Fact.

Approved Oct. 27, 1916.
EDWARD E. CUSHMAN,
Judge.

Indorsed: Bond on Appeal. Filed October 27, 1916.

NO. 57

ORDER AS TO EXHIBITS

It appearing in the opinion of the Judge presiding in the United States District Court for the Western District of Washington, Northern Division, necessary and proper that the original exhibits offered and received in evidence or filed in said cause on trial thereof, should be inspected in the above entitled Court upon appeal;

It is ordered that said original exhibits be retained for safe keeping, by the Clerk of said District Court, to be by him transmitted under his hand and seal of said District Court to the Clerk of the above entitled

Court at San Francisco, California, as a supplemental record herein upon appeal.

Dated at Seattle, Washington, October 27, 1916.

EDWARD E. CUSHMAN,

Judge of the United States District Court, Western District of Washington, sitting in the Northern Division.

Indorsed: Order as to Exhibits. Filed October 27, 1916.

No. 57

ORDER EXTENDING TIME TO DOCKET CAUSE ON APPEAL

Now on this 2d day of November, 1916, the above entitled cause came on to be heard upon the motion of the plaintiffs and appellants for an order extending the time in which to docket this case and to file the record thereof with the Clerk of the Circuit Court of Appeals for the Ninth Circuit, upon the ground that the same is necessary by reason of the great bulk of the record to be transcribed or printed herein, and the court upon hearing said motion and being fully advised in the premises, and considering that good cause has been shown for granting the same, and being the Judge who signed the Citation on appeal herein;

IT IS ORDERED That the time within which said appellants shall docket said cause on appeal and the return day named in the Citation issued by this Court, be enlarged to and including the 1st day of January, 1917.

EDWARD E. CUSHMAN, Judge.

Service of the foregoing Order and receipt of a copy thereof admitted this 2d day of November, 1916.

S. C. ROSE,
C. F. RIDDELL,
Attorneys for Defendants, Appellees.

Indorsed: Order Extending Time to Docket Cause on Appeal. Filed November 2, 1916.

No. 57

STIPULATION AND ORDER AS TO RECORD

It is hereby stipulated by and between the parties

plaintiff and defendant through their respective counsel, that in preparing the transcript and record on appeal all captions, except the name of the paper and number of the cause, except where specially noted in the Praecipe for record on appeal, and all verifications, all certificates of notaries public or other officers or officials to all depositions taken and also the stipulation with reference to taking the depositions, may be omitted, and that all indorsements except to show the name of the paper and date of filing, and all acceptances of service of papers, may be omitted.

PETERS & POWELL,
Attorneys for Plaintiff.
S. C. ROSE,
C. F. RIDDELL,
Attorneys for Defendants.

On reading the foregoing Stipulation as to the record on appeal in this cause it is ordered that said record may be so prepared and filed.

Dated at Seattle, Washington, this 2d day of November, 1916.

EDWARD E. CUSHMAN,
Judge of the above entitled Court.

Indorsed: Stipulation and Order as to Record. Filed November 2, 1916.

NO. 57

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

CHARLES H. RUDDOCK and TIMOTHY H. McCARTHY,

Plaintiffs

vs.

CLALLAM COUNTY, a municipal corporation and HERBERT H. WOOD, Treasurer,

Defendants.

No. 57

PRAECIPE

TO THE CLERK OF THE ABOVE ENTITLED COURT:

You will please prepare a record on appeal in the above entitled cause, consisting of the following:

(1) Caption exhibiting the proper style of court and title of the case; a statement showing the time of commencement of the case; names of the parties; the several dates when the respective pleadings were filed; the time when the trial was had; the name of the judge hearing same; dates of entry of the decree; of plaintiffs' petition for rehearing; of argument on petition to rehear and of the court's taking same under advisement; of the entry of final order denying petition to rehear; of filing petition for appeal; of allowance of petition by the court and the filing of assignment of errors.

(2) Plaintiffs Complaint, filed March 8, 1915.

(3) Defendants' motion to dismiss plaintiffs' bill of complained, filed March ——, 1915.

(4) Order denying defendants' motion to dismiss complaint filed March 29, 1915.

(5) Defendants' answer filed May 3, 1915.

(6) Statement of testimony as approved by the court and filed in said cause.

(7) Stipulation with reference to transcribing pleadings and amended pleadings in this record.

(8) The following depositions taken and filed in this cause on the —— day of————1915, to wit:

Testimony of R. W. Schumacher and J. P. Christensen.

Testimony of J. A. Adams.

The following portions of the testimony of William Garlick: Page 27, lines 6 to 22 inclusive; page 50 line 25 to line 2 on page 51; page 52 lines 3 to 18 inclusive; page 57 lines 21 to 30 inclusive. All cross-examination, re-direct examination and re-cross examination of the witness Garlick.

Testimony of Charles F. Seal, page 66, lines 6 to 13 both inclusive.

(9) The following exhibits in the case:

Plaintiff's Exhibit P, being a letter from Christensen to Grasty dated April 29, 1914.

Plaintiffs' Exhibit L, being letter of J. C. Hansen to Grasty.

Plaintiffs' Exhibit M, letter of Clifford L. Babcock to Grasty.

Plaintiffs' Exhibit N, letter from Lewis Levy to Grasty.

Plaintiffs' Exhibit F, letter from Thomas Aldwell to Grasty dated April 29, 1914.

Plaintiffs' Exhibit E, being photographed list of appraisal of properties by Thomas Aldwell.

Plaintiffs' Exhibit FF. Statement showing assessment of shingle mills in Clallam County.

Plaintiffs' Exhibit T. Assessment of Olympic Power Company's property.

Plaintiffs' Exhibit CC. Written statement from Henry to Grasty.

(10) Statement as to assessment of banks, filed Dec. 11, 1916 in Cause No. 36.

(12) Memo decision filed January 22, 1916.

(13) Decree rendered and entered February 3, 1916.

(14) Plaintiffs' exceptions to allowance of amendment of defendants' answer and order allowing amendments filed February 3, 1916.

(15) Plaintiffs' petition to rehear and modify judgment filed March 3, 1916.

(16) Journal entry showing hearing on petition to rehear entered April 18, 1916.

(17) Memo decision upon petition to rehear, filed May 11, 1916.

(18) Order denying petition to rehear, filed May 15, 1916.

(19) Plaintiffs' notice to defendants of the lodgment of statement of facts, filed September 1, 1916.

(20) Plaintiffs' assignment of errors, filed Oct. 27, 1916.

(21) Plaintiffs' petition for appeal and order allowing same.

(22) Bond on Appeal and approval thereof.

(23) Citation on appeal and admission of service thereof by defendants.

(24) Order of court to send up original exhibits. (All the above, 21, 22, 23 and 24, filed Oct. 27, 1916.)

(25) Journal entry showing adjournment of term of District Court immediately preceding term commencing first Tuesday in May, 1916.

(26) Order of court upon stipulation of parties with respect to settlement of statement of facts filed Oct. 27, 1916.

(27) This praecipe with admission of service thereon by defendants.

(28) Index to all of the above.

Dated at Seattle, Washington, this 30th day of October, 1916.

EARLE & STEINERT,
PETERS & POWELL,
Attorneys for Plaintiffs, Appellants.

Indorsed: Praecipe for Transcript on Appeal. Filed October 31, 1916.

No. 57

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

CHARLES H. RUDDOCK and TIMOTHY H. McCARTHY,

Plaintiffs. Appellants.

vs.

CLALLAM COUNTY, a municipal corporation, and HERBERT H. WOOD, Treasurer,

Defendants. Appellees.

UNITED STATES OF AMERICA to CLALLAM COUNTY, a municipal corporation, and HERBERT H. WOOD, Treasurer.

CITATION

A GREETING:

You and each of you are hereby notified that in a certain suit in the United States District Court for the Western District of Washington, Northern Division, wherein Charles H. Ruddock and Timothy H. McCarthy are plaintiffs and Clallam County and Herbert H. Wood, Treasurer, are defendants, an ap-

peal has been allowed the plaintiffs therein to the United States Circuit Court of Appeals for the Ninth Circuit.

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the city of San Francisco, State of California, thirty days after the date of this Citation, to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable E. E. Cushman, Judge of the United States District Court for the Western District of Washington sitting in the Northern Division, this 27th day of October, 1916.

EDWARD E. CUSHMAN,
United States District Judge for the Western District of Washington sitting in the Northern Division.

Received a copy of the above and foregoing Citation this 27th day of October, 1916.

SANFORD C. ROSE,
DEVILLO LEWYS,
J. E. FROST,
E. C. EWING,
R. S. JONES,
C. F. RIDDELL,
Attorneys for above named Appellees.

Indorsed: No. 57. In the District Court of the United States, Western District of Washington, Northern Division. Charles H. Ruddock and Timothy H. McCarthy, Plaintiffs, vs. Clallam County, et al., Defendants. CITATION. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Oct. 27, 1916, Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

CHARLES H. RUDDOCK and TIMOTHY H. McCARTHY,

Plaintiffs,

vs.

CLALLAM COUNTY, a municipal corporation, and HERBERT H. WOOD, Treasurer,

Defendants.

IN EQUITY—No. 57

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD

UNITED STATES OF AMERICA
WESTERN DISTRICT OF WASHINGTON—SS.

I, Frank L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify the foregoing 80 printed pages numbered from 1 to 70, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as are necessary to the hearing of said cause in the United States Circuit Court of Appeals for the Ninth Circuit, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the appellants for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, to wit:

Clerk's fee (Sec. 828 R. S. U. S.), for making record, certificate or return, 323 folios at 15c ..... $ 48.45

Certificate of Clerk to transcript of record—4 folios at 15c	.60
Seal to said Certificate	.20
Statement of cost of printing said transcript of record, collected and paid	79.55
Total	$128.80

I hereby certify that the above cost for preparing, certifying and printing record amounting to $128.80 has been paid to me by counsel for complainants.

I further certify that I hereto attach and herewith transmit the original Citation issued in this cause, and under separate cover Stipulation to submit this cause on the Evidence Printed in the Record of Equity Cause No. 36 on appeal to this same term.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 27th day of December, 1916.

FRANK L. CROSBY,
Clerk United States District Court.

(SEAL)

No. 2909

United States

Circuit Court of Appeals

For the Ninth Circuit.

TWENTY-ONE MINING COMPANY, a Corporation,

Appellant,

vs.

ORIGINAL SIXTEEN TO ONE MINE, INC., a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 2909

United States

Circuit Court of Appeals

For the Ninth Circuit.

TWENTY-ONE MINING COMPANY, a Corporation,

Appellant,

vs.

ORIGINAL SIXTEEN TO ONE MINE, INC., a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States, in and for the Northern District of California, Second Division.

IN EQUITY.

ORIGINAL SIXTEEN TO ONE MINE, INC., a Corporation,

Plaintiff,

vs.

TWENTY-ONE MINING COMPANY, a Corporation.

Defendant.

Bill of Complaint.

The ORIGINAL SIXTEEN TO ONE MINE, INC., the plaintiff, brings this, its Bill of Complaint, against the TWENTY-ONE MINING COMPANY, the defendant, and for cause of action, alleges:

I.

That ever since on or about the 13th day of January, 1910, the plaintiff, the Original Sixteen to One Mine, Inc., has been and now is a corporation, organized and existing under and by virtue of the laws of the State of California, having its office and principal place of business in the City and County of San Francisco, in said State, and at all of said times said plaintiff was and now is a citizen and resident of the said State of California.

II.

That ever since on or about the 22d day of January, 1909, the defendant Twenty-One Mining Company [1*] has been and now is a corporation

*Page-number appearing at foot of page of original certified Transcript of Record.

organized and existing under and by virtue of the laws of the State of Arizona, having its principal place of business in the City of Phoenix, in said State, and at all of said times said defendant was and now is a citizen and resident of the said State of Arizona.

III.

That for more than five years last past, the plaintiff, and its predecessors in title have been, and plaintiff is now, the owner of, in possession of, and entitled to the sole, immediate and exclusive possession of the Sixteen to One Quartz Mine or lode mining location, and of all the mineral ore, ore bearing rock, and metal existing and found to exist in said lode mining claim, by virtue of due compliance with the laws of the United States and of the State of California, pertaining to the location, ownership and possession of mining claims; said claim being situated in the Alleghany Mining District, in the County of Sierra, State of California, and more particularly described as follows:

BEGINNING at Corner No. 1 whence the quarter section corner between Section 34, T. 19 N., R. 10 E. M. D. M. and Section 3, T. 18 N., R. 10 E. M. D. M. bears South 15° 50′ E. four hundred and thirty-one (431) feet distant; thence north 34° 49′ west one hundred and twenty-one and 29/100 (121.29) feet to Corner No. 2; thence north 42° 49′ east two hundred and twenty and 6/10 (220.6) feet to Corner No. 3; thence north 53° 24′ east seventeen (17) feet to Corner No. 4; thence north 51° 24′ west

six hundred and twenty-two and 36/100 (622.36) feet to Corner No. 5; thence south 60° 49′ west seventy-six and 57/100 (76.57) feet to Corner No. 6; thence north 28° 45′ west six hundred forty-nine and 6/10 (649.6) feet to corner No. 7; [2] thence south 54° 18′ west two hundred and twenty-nine and 2/10 (229.2) feet to Corner No. 8, the same being the northerly end line of said claim; thence south 39° 44′ east three hundred and forty-nine (349) feet to Corner No. 9; thence south 6° 35′ east one hundred and seventeen and 43/100 (117.43) feet to Corner No. 10; thence south 58° west ninety-nine and 24/100 (99.24) feet to Corner No. 11; thence south 32° 02′ east fifty-four and 52/100 (54.52) feet, to Corner No. 12; thence south 57° 22′ west one hundred and twenty-two and 4/10 (122.4) feet to Corner No. 13; thence south 39° 37′ east nine hundred and twenty-seven and 8/10 (937.8) feet to Corner No. 14; thence north 54° 18′ east three hundred and fifty-three and 7/10 (353.7) feet to Corner No. 1, the place of beginning, said last mentioned line being the southerly end line of said claim.

IV.

That there exists within said Sixteen to One lode mining claim, so owned and possessed by plaintiff, as aforesaid, a lode or vein of rock in place carrying gold and other valuable metals and minerals, on which lode or vein the original discovery of said lode mining location was made; that said lode or vein, on its course or strike, traverses the said Sixteen to

One lode mining claim from end to end, crossing both the northerly and the southerly end lines thereof; and that the top or apex of said lode or vein is wholly included within the side lines of the said Sixteen to One lode mining claim.

That for more than five years last past, the plaintiff, and its predecessors in interest, have been and the plaintiff is now, the owner of and in possession of and entitled to the sole and exclusive possession of said vein through its entire depth, between planes drawn veritically downward through the northerly and the southerly end lines of said Sixteen to One lode mining claim; both planes being extended indefinitely in the direction of the dip of [3] said vein, except as the said possession of said segment of said vein on its dip has been interfered with by the unlawful entry upon said segment of said vein by the defendant as hereinafter set forth.

That said Sixteen to One vein, as hereinbefore described, on its downward course, so far departs from the perpendicular as to pass through the easterly side line of said Sixteen to One claim and into and beneath the surface of the adjoining Belmont, Valentine, and Tightner Extension lode mining claims claimed by defendant and beneath adjoining lode mining claims belonging to third parties, and that within said lode or vein there has existed at all times mentioned in this Bill of Complaint, and does exist, large quantities of ore and rock in place bearing gold and other valuable metals, which were and are so owned and possessed by plaintiff, and to which plaintiff had and has the sole and exclusive right to

search for and extract and remove; that until the entry upon said vein and ore by said defendant, as hereinafter set forth, plaintiff was in the sole and exclusive possession of the said vein and ore and in possession of the sole and exclusive right to search for, extract and remove said ore and rock in place bearing gold and other valuable metals.

V.

That said defendant claims and asserts adversely and in hostility to this plaintiff some estate, right, title and interest in and to said segment of said Sixteen to One vein or lode as above described and in pursuance of such asserted adverse claim said defendant is now and has been within three years last past willfully and unlawfully entering upon portions of said extralateral segment of said [4] vein lying between said vertical planes as above described and during a period of three years last past has willfully and unlawfully trespassed upon said segment of said vein and mined and extracted and converted to its own use valuable ore therefrom.

VI.

That said adverse and hostile claim so made by this defendant to any portion of said extralateral segment of said Sixteen to One vein lying between said vertical planes hereinbefore defined is without any right whatever, and that defendant has by means of its mine workings extracted and removed from said segment of said vein, the property of the plaintiff as hereinbefore alleged, gold and gold-bearing ores and metals of great value, the property of this plaintiff, as in this Bill of Complaint alleged, and

that the value of the same so extracted and removed by said defendant is to this plaintiff unknown, but said plaintiff is informed and believes, and upon such information and belief alleges that the value of such ores and metals is in excess of the sum of one hundred thousand ($100,000) dollars.

VII.

Plaintiff further alleges that said trespasses and acts hereinbefore referred to were done and committed by the defendant willfully, knowing that said ores extracted, as aforesaid, were not the property of said defendant, and that it had no right, title or interest therein, but knowing that the same were the property of said plaintiff; that defendant is still engaged, willfully and wrongfully, in extracting and removing gold and gold-bearing ores and metals, [5] the property of this plaintiff, from said segment of said vein on its dip and wrongfully and willfully continues in possession of the portion thereof which is physically controlled by the mine workings of said defendant and withholds possession thereof from this plaintiff; that defendant is now mining and extracting large quantities of rich and valuable ore from said vein on its said dip and within said extralateral segment of said vein belonging to this plaintiff, as hereinbefore set forth, and that a portion of such mining and extracting of ore has extended beyond the vertical boundaries of the mining claims to which defendant claims ownership and has penetrated beneath the surface of adjoining territory, to wit, the Eclipse Extension lode, which is neither owned nor controlled by said defendant, but

as plaintiff is informed and believes, and therefore alleges, is owned by third parties who are not parties to this action; and that this said defendant intends to and unless restrained by this court will continue to further intrude and trespass upon said segment of said vein, the property of this plaintiff, as in this Bill of Complaint described, and intends to and will make further mine workings and excavations, for the purpose of mining said ground and extracting and removing therefrom the mineral, ore, ore-bearing rock and metals therein, and intends to and will continue to dig up and extract and remove from said ground, the property of this plaintiff, and convert to its own use, the mineral, ore, ore-bearing rock and metals therein, and will take from said property of plaintiff the entire value thereof, to the great and irreparable injury of plaintiff. [6]

Plaintiff further avers that unless the said defendant, its agents, servants and employees are restrained and enjoined from intruding and trespassing upon said vein and ore, the property of this plaintiff, and making cuts, openings, and excavations thereon, and digging up, extracting and removing and carrying away from said property the mineral, ore, ore-bearing rock and metals therein contained, the value and substance of said property of plaintiff will be destroyed, and this plaintiff will suffer irreparable injury. That the said mineral, ore, ore-bearing rock and metals in said vein and mine of plaintiff constitute the sole value of said property. [7]

VIII.

Plaintiff avers that the matter in dispute in this action exceeds, exclusive of interest and costs, the sum of one hundred thousand ($100,000) dollars.

IX.

Plaintiff further avers that heretofore, to wit, on the 2d day of Aug., 1916, the plaintiff commenced an action at law against the defendant herein in the District Court of the United States in and for the Northern District of California, to recover of and from said defendant the possession of all and singular the property of plaintiff hereinbefore in this Bill of Complaint described, and to recover the sum of one hundred thousand ($100,000) dollars, as damages for the wrongs and injuries heretofore done and committed by said defendant upon the property of this plaintiff, as in this Bill of Complaint set forth. That said action at law is now pending in said court and undetermined. In consideration whereof, and for as much as plaintiff is entirely remediless in the premises at and according to the strict rules of the common law, and can have relief only in a court of equity, where matters of this nature are properly cognizable and relievable;

To the end, therefore, that said defendant and its agents, servants, employees and confederates, if any, may be restrained from the doing of said acts therein, and from the continuance of the trespass and waste upon said vein and ore, the plaintiff hereby waiving an answer under oath to the Bill of Complaint, and to the matters and things therein stated and charged, prays: [8]

That said defendant may be required to set forth the nature and extent of its claims; that all adverse claims of said defendant may be determined by decree of this Court; that by its decree it be declared and adjudged that defendant hath not any estate or interest whatever in or to said Sixteen To One vein or lode as hereinbefore described or to any part or portion thereof; that it be declared and adjudged that the title of this plaintiff to such vein and to each and every part thereof on its dip between the northerly and southerly end line planes of said Sixteen To One lode mining claim, is good and valid; and that defendant be enjoined and forever restrained from asserting any claim whatsoever in or to said lode or vein throughout its length or dip adverse to plaintiff.

That a writ of injunction issue out of and in accordance with the rules and practice of this court, to be directed to said defendant, Twenty-one Mining Company, to restrain it, and its agents, servants, employees and confederates, from entering into or upon the vein and property of the plaintiff in this Bill of Complaint described, and from further working or mining thereon, or working or continuing any cut, opening, level, drift, or excavation within said vein, or on or in any part thereof, or excavating any mineral, ore, ore-bearing rock or metals therein, or digging up, extracting or removing any of said mineral, ore-bearing rock, metals or any mineral substance whatever from said segment of said vein hereinbefore described, and from in any manner hindering or obstructing plaintiff, or its agents, servants

and employees, or any or either of them, from working and mining said vein, or in or upon any of the mineral, ore, ore-bearing rock and metals therein; also a restraining order to the same effect, [9] until an application can be heard; and that upon the final determination of said action at law, such injunction may be made perpetual; that an account be taken for the waste committed, and that plaintiff have judgment therefor, and for such other and furthere relief as to this Court may seem meet and just.

(Signed) WILLIAM E. COLBY,
(Signed) GRANT H. SMITH,
Attorneys for Plaintiff.

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

S. B. Connor, being first duly sworn, deposes and says:

I am an officer of the corporation, original Sixteen To One Mine, Ins., plaintiff named in the foregoing complaint, to wit, Vice-president thereof, and I make this affidavit in behalf of said plaintiff.

I have read the foregoing Bill of Complaint and know the contents thereof; the same is true of my own knowledge, except as to such matters and things as are therein stated upon information or belief, and as to such matters I believe it to be true.

(Signed) S. B. CONNOR.

Subscribed and sworn to before me this 2d day of August, 1916.

[Seal] (Signed) EUGENE W. LEVY,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Aug. 2, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [10]

[Title of Court and Cause.]

Affidavit of Fred Searles, Jr.

State of California,
City and County of San Francisco,—ss.

Fred Searles, Jr., being first duly sworn, deposes and says:

That he is a citizen of the United States, and a resident of Nevada City, California;

That he is a mining geologist by profession, and has practiced his profession continuously for a period of seven (7) years; that he received his technical education at the University of California, and is a graduate of the department of mining and geology of that institution; that since graduation, he has practiced his profession in most of the mining states of the United States, in Canada, Alaska, Mexico and in other parts of the world; that he has for several years been familiar with the Alleghany Mining District, Sierra County, California, and has examined most of the operating mines in that locality.

That he has on three occasions visited the [11] Sixteen to One Mine, Inc., and that on the 13th and

14th days of July, 1916, he examined the said Sixteen to One Mine for the purpose of investigating the position of the apex of the vein exposed in said mine with relation to the boundary lines of the Sixteen to One quartz lode mining claim and the relation between the vein exposed in the workings of the Sixteen to One Mine and the vein exposed in the workings of the Twenty-one Mining Company and affiant further declares that he has examined said workings of said Sixteen to One Mine and a portion of the workings of the Twenty-one Mine lying underneath the Valentine mining claim, which workings are exhibited upon the map Exhibit "A" accompanying the affidavit of George O. Scarfe filed herewith, but that he was denied entrance to the major portion of the workings of the Twenty-one Mine.

Affiant declares that the tunnel known as the "upper tunnel" of the Sixteen to One Mine is driven upon a vein known as the Sixteen to One vein, and follows said vein continuously from the mouth to the face of said tunnel. That the course or strike of said vein is N. 40° W. and that said vein departs from the horizontal on its downward course to the N. E. with a dip or declination varying from 22° to 50°.

And affiant further declares that the said Sixteen to One vein is exposed at the surface of the earth at the mouth of the said upper tunnel or Tunnel No. 1 of the Sixteen to One Mine and that said exposure of said outcrop or apex of said Sixteen to One vein crosses the southerly end line of said Sixteen to One quartz lode claim at said point; and that said

outcrop or apex may be seen coursing northerly within the boundaries of said Sixteen to One claim for a distance [12] of about one hundred feet, being exposed on the Tightner road cutting. And that said apex of said Sixteen to One vein cannot be seen at the surface for a greater distance to the north, but is covered to the north with soil, loose rock, gravel and lava, said covering of gravel and lava increasing in depth to the north and attaining a depth of more than a hundred feet at the northerly end of said Sixteen to One quartz lode claim.

And affiant further declares that the dip of the said Sixteen to One vein at the face of said tunnel No. 1 of said Sixteen to One Mine is such that a raise driven upon said Sixteen to One vein from the face of said Sixteen to One upper tunnel or tunnel No. 1 would come to the surface of bedrock at a point within the exterior boundaries of said Sixteen to One quartz lode claim.

Affiant further declares that he has followed said Sixteen to One vein from said Sixteen to One upper tunnel upon its downward course from said upper tunnel through stopes to the tunnel called No. 2 or drain tunnel of the said Sixteen to One Mine, shown upon the map, Exhibit "A," and that said vein is continuous through said stopes and that said vein exposed in said lower tunnel is the same vein as that exposed in the said upper tunnel of the said Sixteen to One Mine; and that a raise now being driven from the face of the said drain tunnel or lower tunnel shown upon the map Exhibit "A" to follow said Sixteen to One vein upon its upward course from the

face of said lower tunnel will reach the surface of bedrock within the limits of the said Sixteen to One claim and will expose the apex of said Sixteen to One vein within the limits of said claim at a point about seven [13] hundred feet northerly of the southerly end line of said Sixteen to One claim. And affiant further states that the dip of the vein within the said upper tunnel and within the said lower tunnel or drain tunnel of the said Sixteen to One Mine is such that the vein will have its apex or outcrop, at the surface of bedrock, continuously within the external limits of said Sixteen to One claim from said southerly end line for this distance of about seven hundred feet northerly from said southerly side line. And affiant believes that the apex of the said Sixteen to One vein will continue to lie within the exterior boundaries of the said Sixteen to One quartz lode mining claim for a further distance beyond said seven hundred feet from said southerly end line and that it will lie within the exterior boundaries of said Sixteen to One claim throughout the length of said claim and that it will cross the northerly end line of said claim, but affiant is unable to declare that such will certainly be the case, but declares that excavations will have to be made under the lava and gravel that overlie the northerly end of the claim to determine accurately the location of said apex with respect to the exterior boundaries of the northerly end of said Sixteen to One claim.

Affiant further declares that the said Sixteen to One vein is continuous from its apex where exposed

at the surface of the earth at the southerly end of the Sixteen to One lode mining claim downward to the lower tunnel of said Sixteen to One Mine and below said tunnel and that he has followed said vein and traced said vein continuously to a level called the one hundred and fifty foot level, being about one hundred and fifty feet below the said lower tunnel of said Sixteen to One Mine. And that at said one hundred [14] and fifty foot level said Sixteen to One vein is intersected by a normal fault which interrupts said vein and displaced the portion of said vein lying to the east of said fault a distance of about fifty-five feet in a direction down the dip of the said fault; and that the lines of intersection of said vein by said fault are not horizontal lines, because said fault intersects said vein obliquely but that said lines decline to the north on said vein so that the interruption by said fault is at greater depth in a section north of the Sixteen to One shaft than is the case in a section through said shaft.

And affiant further declares that said interruption of the Sixteen to One vein by said fault is a casual displacement and in no wise conceals the identity of the two segments of the said Sixteen to One vein, but that the identity and former continuity of the said two segments is extremely apparent by reason of the similarity in course, dip, width, appearance and mineralogical content of said two segments, and also by reason of the existence of drag ore in said fault between said segments, the edge of the lower segment being dragged up toward the upper segment and the edge of the upper segment being

dragged down toward the lower segment, and that said interruption is such an interruption as is found with great frequency in many mines and is found in other mines of the said Alleghany District.

And affiant further declares that said Sixteen to One vein is continuous from said fault from a point about forty feet above the two hundred and fifty foot level of said Sixteen to One Mine, to the four hundred foot level of said mine, except that the quartz in said vein is broken at the three hundred foot level of said mine by a small fault which displaces said quartz from the upper side of the shaft to the lower side, and that he has traced said vein continuously through this interval; and that said vein is continuous from said four hundred foot level to the bottom of the Sixteen to One shaft, said vein lying for the most part about ten feet above said shaft and being visible in three short raises driven from the hanging-wall of said shaft through said vein.

And affiant further declares that he has caused [15] to be made from the surveys of the Sixteen to One Mine, and from the map Exhibit "A" accompanying the report of George O. Scarfe filed herewith, a vertical transverse section which shows correctly the relation of the tunnels and shaft and levels of the said Sixteen to One Mine, and of the Twenty-One Mine to each other and to the exterior side lines of the Sixteen to One claim. And affiant has depicted on said section the position of the apex of said Sixteen to One vein with relation to said exterior boundaries and has depicted the said vein on its downward course with relation to the position of

said workings and has depicted said fault which interrupts the vein between the one hundred and fifty foot and the two hundred an fifty foot levels of said Sixteen to One Mine; and affiant hereby incorporates said section, Exhibit "B" into this affidavit, and makes it a part hereof.

And affiant further declares that on the 26th day of July, 1916, he gained entrance from the lower of these three raises to the stopes and workings of the Twenty-One Mining Company, driven from the Twenty-One tunnel, and that these stopes and workings are driven on the same vein, namely, the Sixteen to One vein, having its top or apex within the Sixteen to One lode mining claim. And that he examined said vein in said stopes and workings of said Twenty-One Mining Company and followed said vein on its downward course to the lower or main tunnel of the said Twenty-One Mining Company, and along said tunnel for a distance of about one hundred and fifty feet; and that he was not permitted to follow said vein further in said tunnel, but was prevented from so doing by officers of the said Twenty-One Mining Company. But affiant believes that said Twenty-One tunnel follows said Sixteen to [16] One vein continuously from said point of entrance from the Sixteen to One shaft to the face of said tunnel.

And affiant further declares that said workings, tunnel, drifts, and stopes, made by the Twenty-One Mining Company are upon said Sixteen to One vein between vertical planes passed through the end lines of the Sixteen to One lode mining claim, and ex-

tended in their own direction and are between a plane so passed through the southerly end line and a parallel plane seven hundred feet northerly thereof.

And affiant expressly declares that no portion of the vein exposed in the workings of the Twenty-One Mining Company underneath the Ophir, Eclipse Extension and Valentine claims, has its apex within any of said claims or within the Twenty-One lode mining claim, but that said vein has its apex in the Sixteen to One mining claim.

And affiant further declares that the ore occurring in said Sixteen to One vein is very rich ore containing gold in large quantities and that the valuable nature of said Sixteen to One vein is due to the occurrence of small chimneys or shoots of very rich ore, and that said vein is characteristically barren or low grade between such shoots. And affiant declares that it is possible to extract large quantities of gold from small areas of said vein and that it is impossible to determine the value of gold so extracted from the size or appearance of the stope from which the ore was extracted or from the assay value of the vein exposed at the edges of such stope.

And affiant believes that if the Twenty-One Mining Company be permitted to continue to work said Sixteen to One vein between the vertical end-line planes produced of [17] the said Sixteen to One lode mining claim, and to extract ore therefrom and to convert the proceeds of said ore to its own use, that said trespass upon said Sixteen to One vein will work an immediate and irreparable injury to the owners of the said Sixteen to One quartz lode claim.

IN WITNESS WHEREOF, affiant sets his hand.

(Signed) FRED SEARLES, Jr.

Subscribed and sworn to before me this 2d day of August, 1916.

[Seal] (Signed) EUGENE W. LEVY,
Notary Public in and for the City and County of San Francisco, State of California.

(Here follows map.)

[Endorsed]: Filed Aug. 2, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [18]

[Title of Court and Cause.]

Application for Restraining Order and Order of Inspection.

State of California,
City and County of San Francisco,—ss.

S. B. Connor, being first duly sworn, deposes and says: That he is the vice-president of plaintiff in the above-entitled action and has taken a leading part in the management and operation of the Sixteen to One Mine, in behalf of the said plaintiff, and that he makes a part hereof the Bill of Complaint filed herein for all the matters and particulars therein set forth. That he has had a wide mining experience for over forty years last past, in the States of California and Nevada, and also in Mexico and South Africa, and has been engaged in developing and exploiting mines and connected with mining operations during said period of time.

That for approximately three years last past, he has been one of the directors of the plaintiff com-

pany and for a portion of said time has been president and more recently [19] has been and is vice-president of said plaintiff company, and has taken a leading part in the development and operation of said Sixteen to One Mine.

That this affiant has just returned from the properties in question and has kept in close touch with the progress of the work of the plaintiff in sinking its incline shaft and extending levels therefrom and with the formation disclosed therein. That about a month ago, this affiant has inspected the workings of the defendant under arrangement with the representative of said defendant.

That the above-named plaintiff is the owner of the Sixteen to One lode location and the above-named defendant claims to be the owner of the adjoining Belmont and Valentine lode mining claims situated northeasterly of and adjoining said Sixteen to One claim, the relative positions of said claims being shown on the plat attached hereto and marked Diagram One. That crossing the southeasterly end line of the Sixteen to One claim and about three hundred feet from the southwest corner of said claim is the apex of the main Sixteen to One discovery vein. Said apex of said vein extends northwesterly within the boundaries of said Sixteen to One claim for a distance of over eight hundred feet, said apex of said Sixteen to One vein being established by actual exposure on the surface to a point where it passes underneath the lava capping situated on said claim, and also by drain tunnel which extends northwesterly from the southerly end line of said claim for

a distance of approximately seven hundred and fifty feet. That said vein can be traced throughout the entire length of said drain tunnel [20] to its face, and that at its face said vein is only a comparatively short distance below the original surface, and is very close to the northeasterly side boundary of said Sixteen to One claim, so that in following up to the original surface under the lava capping on the dip of said vein, it is a certainty that said apex exists within the vertical boundaries of said Sixteen to One claim approximately eight hundred feet northwesterly from the southerly end line thereof. That said vein dips in a northeasterly direction from said apex and can be followed down from said apex through continuous workings in an incline shaft which has been sunk on said vein for a distance of approximately seven hundred and fifty feet, and that said vein is either encountered in said shaft or is in close proximity to the same for the entire distance to the bottom of said incline shaft, and that on the 25th day of July, 1916, said bottom of said shaft was connected with an upraise made by defendant which followed said vein up from their main tunnel so that the identity and continuity of the said Sixteen to One vein from its apex in the Sixteen to One claim down to and connecting with the workings of the defendant situated vertically beneath the adjoining Belmont and Valentine mining claims has been demonstrated. That said defendant has extended its workings northeasterly from said point where said intersection of workings of defendant and plaintiff has been made and said Sixteen to One vein can be

traced continuously along said workings in a northeasterly direction and also in a southwesterly direction from said point and said defendant [21] is now engaged in extracting ore from said vein which affiant has every reason to believe is high grade in character and that said ore is now being stoped and removed from said Sixteen to One vein between a vertical plane passed through the southerly end line of the Sixteen to One claim and another plane parallel thereto situated seven hundred and fifty or eight hundred feet northwesterly therefrom at the furtherest present known exposure of the Sixteen to One vein in the said Sixteen to One claim. Said vertical planes being extended indefinitely northeasterly in the direction of the dip of said Sixteen to One vein.

That the ore in said vein occurs in rich shoots of comparatively limited extent, so that a large amount of value, amounting to thousands of dollars can be extracted within a very short period of time, and that affiant fully believes that defendant is engaged in extracting ore from one of these shoots at the present time and that if allowed to continue a great portion of the value of the Sixteen to One vein as it extends extralaterally beneath the adjoining locations claimed by defendant will be removed.

That unless restrained, defendant threatens to and will continue and is actually engaged in mining and extracting valuable ore from said extralateral segment of said Sixteen to One vein and will remove all the substance and value from said ground to the great and irreparable injury of this plaintiff.

That affiant is credibly informed that there [22] is a large judgment, amounting to upwards of thirty thousand ($30,000) dollars, outstanding against said defendant, and that if defendant is allowed to continue to extract said ore and appropriate the proceeds to its own use that plaintiff will be unable to recover any of the value of said ore from said defendant.

That in order to make proper preparations for the trial of this cause, it is necessary that plaintiff, through its attorneys, surveyors and other representatives, be allowed at reasonable times to enter the mine workings and property of the defendant for the purpose of inspecting the same, and surveying, photographing and sampling and otherwise examining said workings and the formation there disclosed.

WHEREFORE, this affiant, in behalf of the plaintiff, prays that a temporary restraining order issue out of this Honorable Court to be directed to the defendant Twenty-one Mining Company and restraining it and its servants, agents and employees, and all persons claiming under or connected with said defendant from further working or mining, or extracting ore from any portion of the said vein lying between said vertical planes above described and that said order further direct said defendant, and its servants, agents and employees, and all persons claiming under it, to permit said plaintiff, through its representatives, to enter the premises and mine workings controlled by defendant for the purpose of inspecting, surveying, photographing, sampling and examining the same at reasonable

times, and plaintiff further [23] prays that after due notice that a hearing be had for the purpose of continuing said restraining order *pendente lite* by a writ of injunction, and plaintiff prays for such further relief as to this Court may seem meet and equitable.

(Signed) S. B. CONNOR,
As Vice-president of and in Behalf of the Plaintiff.

Subscribed and sworn to before me this 2d day of August, 1916.

[Seal] (Signed) EUGENE W. LEVY,
Notary Public in and for the City and County of San Francisco, State of California.

WM. E. COLBY, (Signed)
GRANT H. SMITH, "
Attorneys for Plaintiff.

(Here follows map.)

[Endorsed]: Filed Aug. 2, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [24]

[Title of Court and Cause.]

Affidavit of George O. Scarfe.

State of California,
County of Sierra,—ss.

George O. Scarfe, being first duly sworn, deposes and says:

That he is a citizen of the United States and a resident of Alleghany, Sierra County, California.

That he is a mining engineer by profession and has practiced said profession for a period of six years, the major portion of which time has been spent in

and about the Alleghany Mining District, Sierra County, California.

That in the course of said practice he has become familiar with all of the operating mines in said Alleghany Mining District and has made surveys and examinations of many of said mines.

That he is and for several years last past has been familiar with the mine known as the Sixteen to One Quartz Mine and with the adjacent and surrounding mining claims and with the Twenty-one Quartz Lode Mining Claim.

That on the 20th day of June, 1916, he was engaged by the original Sixteen to One Mine, Inc., to make surveys of the workings of the Sixteen to One Mine and of the boundaries [25] of the Sixteen to One quartz mining claim, and to co-ordinate said surveys and depict the said surveys upon a map or plat for the purpose of showing the position of said workings of the Sixteen to One Mine with relation to the boundary lines of the said Sixteen to One Quartz lode mining claim, and with relation to the workings of the said Twenty-one Mine.

And affiant further declares that he has completed said surveys and has depicted the same upon a map marked Exhibit "A" and which is hereby incorporated in this affidavit and made a part thereof. And that all of the workings depicted upon said map are so depicted as the result of his surveys except those certain workings colored in yellow which working is the Twenty-one lower tunnel.

And said affiant further declares that the said surveys of the said Sixteen to One quartz lode min-

ing claim and of the workings of the said Sixteen to One Mine are correct surveys and that the said map Exhibit "A" correctly represents the relation of said workings to the boundary lines of said quartz lode mining claim, except that said working colored in yellow was not surveyed by said affiant but was surveyed by the surveyor of the Twenty-one Mining Company and was placed on said map Exhibit "A" as a true and correct copy of the map furnished by the said surveyor of the said Twenty-one Mining Company.

And affiant further declares that he has not been permitted to survey the said working known as the Twenty-one lower tunnel, but has at all times been denied entrance to said working, but that he has surveyed the position of the mouth of the Twenty-one tunnel and has gained entrance from the Sixteen to One shaft to a portion of the tunnel which lies under the surface of the [26] Valentine quartz lode mining claim.

And affiant states that to the best of his knowledge, based on said survey of the mouth of said tunnel and upon said entrance from said Sixteen to One shaft, the position of said Twenty-one tunnel is correctly shown on said map Exhibit "A" incorporated in this affidavit.

And affiant further declares that he has depicted upon the said map Exhibit "A" the boundaries of the Ophir, the Eclipse and the Eclipse Extension quartz lode mining claims in accordance with the official surveys for patent of said claims and has depicted upon said map Exhibit "A" the boundaries

of the Twenty-one Mining Claim, the Eagle Mining Claim, the Belmont Mining Claim, and other adjoining claims from the map of the surveyor of the Twenty-one Mining Co., and affiant believes that the boundaries of said Twenty-one Mining Claim, Eagle Mining Claim, Belmont Mining Claim and other adjoining claims are correctly depicted upon said map Exhibit "A" but affiant has not surveyed said mining claims.

And affiant further declares that the vein exposed in the said Twenty-one tunnel and upon which stopes have been constructed and within the limits of the Valentine Eclipse Extension and Ophir quartz lode mining claims is the same vein as that exposed in the shaft of the Sixteen to One Mining Co., and in the levels and stopes from said shaft constructed by said Sixteen to One Mine Incorporated and by their predecessors in interest under the surface of the said Sixteen to One, Belmont, Ophir and Valentine quartz lode mining claims.

And affiant further declares that it is possible to follow and that he has followed the said Sixteen to One vein from the workings of the said Twenty-one Mining Company underneath [27] the Valentine claim into the shaft of the Original Sixteen to One Mine Inc.

And that said Sixteen to One vein on its upward course lies immediately above the Sixteen to One shaft from the bottom of said shaft to the 400 level of said shaft and that entrance to said vein from said shaft is gained by three short raises in said interval below said 400 foot level. And affiant further de-

clares that said Sixteen to One vein is exposed in said shaft continuously on its upward course from said 400-foot level up to the 250-foot level of said Sixteen to One shaft. And that a short distance above the 250-foot level the said Sixteen to One vein is interrupted in its upward course by a fault which displaces the said vein for a distance of about fifty feet. That on the 150-foot level of the said Sixteen to One Mine the said Sixteen to One vein is encountered on the westerly side of the said fault and said vein is followed continuously in said workings of the Sixteen to One Mine up to the upper working tunnel of the said mine. And affiant further declares that said upper tunnel of said Sixteen to One Mine follows said Sixteen to One vein from its mouth to its face and that the top or apex of said vein crosses the southerly end line of the Sixteen to One quartz lode mining claim at the mouth of the said upper tunnel, being 60 feet westerly from Cor. No. 1 of said claim along said southerly end line.

And affiant is able to state and does state that the vein exposed at its outcrop or apex at the mouth of the upper tunnel of the Sixteen to One Mine is the same vein as that exposed in the said Twenty-one tunnel within the limits of said Valentine, Eclipse Extension and Ophir mining claims and that no [28] portion of the Apex of said vein lies within the limits of said Valentine, Belmont, Eclipse Extension or Ophir claims but lies to the west thereof in the said Sixteen to One quartz lode mining claim.

And said affiant further declares that the apex of the said Sixteen to One vein is traceable northerly

from said southerly end line of the Sixteen to One claim for a distance of about one hundred feet outcropping at the surface. And that beyond said point about one hundred feet from said end line, said outcrop is not visible but is buried by the surface wash and by an accumulation of lava and gravel.

And affiant further declares that said Sixteen to One vein is exposed at intervals in the lower tunnel of the Sixteen to One Mine and is exposed in the face of said tunnel at a point about 700 feet northerly from the said Sixteen to One end line. And that the dip of the said vein in the face of the Sixteen to One tunnel is such that, if projected to the surface of the bedrock it would outcrop within the boundaries of the said Sixteen to One quartz lode mining claim. and affiant therefore believes that the said Sixteen to One vein has its top or apex within the boundaries of the Sixteen to One claim continuously from the southerly side line of said claim to a point 700 feet northerly of said southerly side line and for a greater distance.

And affiant further declares that the workings and stopes of the said Twenty-one Mining Co., on the said Sixteen to One vein under the surface of the Valentine, Ophir and Eclipse Extension claims lie between vertical planes passed through the end lines of the said Sixteen to One quartz lode mining claim and extended in their own direction, and that the said [29] Twenty-one Mining Company is now working said Sixteen to One vein between said vertical end-line planes extended of the Sixteen to One mining claim and is extracting valuable ore from said veins between said planes.

And affiant further declares that in the course of the practice of his profession in said Alleghany Mining District he has become somewhat acquainted with the vein known as the Twenty-one vein which outcrops at the surface of the said Belmont quartz lode mining claim and has examined said vein at its outcrop and that to the best of his knowledge and belief said vein is not a valuable vein but is a barren vein or contains too little gold or other precious minerals to be profitably worked and mined. And affiant further states that the workings and stopes of the Twenty-one Mining Company under the surface of said Valentine, Eclipse Extension and Ophir claims are not on the said Twenty-one vein but are upon the Sixteen to One vein apexing in the said Sixteen to One Quartz lode mining claim.

And affiant further declares that to the best of his knowledge and belief the workings of the Twenty-one Mining Co. do not expose commercial ore on the Twenty-one vein or on any vein save only on the Sixteen to One vein within the vertical end-line planes of the Sixteen to One quartz lode mining claim.

And affiant further declares that the valuable ore occurring in the said Sixteen to One vein in the workings of the said Twenty-one Mining Co. underneath the said Valentine, Eclipse Extension and Ophir mining claim is of the kind known as "high grade" ore in which large quantities of gold occur in a small volume or tonnage of said ore. And that the vein between such occurrences of high-grade ore does not consist of valuable ore [30] but of quartz or vein matter containing little or no gold or

precious mineral. And affiant further declares that it is impossible because of the nature of the occurrence of said ore to determine the value of the ore that has been removed from a stope by sampling the edges of the stope or to determine the value in any other manner except only by milling the ore removed.

And affiant therefore declares that if the said Twenty-one Mining Co. is permitted to continue to work said Sixteen to One vein between said vertical end-line planes of said Sixteen to One quartz lode mining claim and to continue to extract valuable ore from said vein and to mill said ore and convert the proceeds of said ore to its own use that said Twenty-one Mining Co. will work immediate and irreparable injury to said original Sixteen to One Mining Co. in as much as it will be impossible to estimate the value of said high-grade ore removed from said Sixteen to One vein between said vertical end planes extended of said Sixteen to One quartz lode mining claim.

GEORGE O. SCARFE.

Subscribed and sworn to before me this 29th day of July, 1916.

[Seal] E. L. CRAFTS,

Notary Public in and for the County of Sierra, State of California.

[Endorsed]: Filed Aug. 2, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [31]

[Title of Court and Cause.]

Answer to Bill of Complaint.

For answer to the Bill of Complaint herein on the equity side of this court, said defendant denies and alleges as follows:

1. Defendant states that it has no information or belief upon the subject sufficient to enable it to answer the same, and placing its denial on that ground it denies that for more than five years last past, or for any other time, or at all, the plaintiff or its predecessors in title, or any of them, have been, or that the plaintiff is now, the owner of, or in the possession of, or entitled to the sole, or immediate, or exclusive, possession of, the said Sixteen to One quartz mine or lode ming location, or of any part thereof, or of all or any part of the mineral, ore, or ore-bearing rock, or metal, existing or found to exist in said mining claim, or that the same is described as set forth in subdivision III of said Bill.

2. That it has no information or belief upon the subject sufficient to enable it to answer the same, and placing its denial on that ground, it denies that there exists within [32] said Sixteen to One lode mining claim any lode or vein of rock in place carrying gold, or any other valuable metal or mineral, or that any lode or vein existing within the boundaries of said Sixteen to One lode mining claim on its course or strike traverses the said Sixteen to One lode mining claim from end to end, or crosses both the northerly or southerly end line thereof, or any end line thereof, or any of the lines thereof, or that the top

or apex of any lode or vein situated within the boundaries of said Sixteen to One lode mining claim is wholly or at all included within the said lines of the said claim, or within any lines thereof.

3. On the same ground it denies that for more than five years last past, or for any other time, or at all, the plaintiff or its predecessors in interest have been, or that it is now, the owner of, or in the possession of, or entitled to the sole or exclusive possession of, any vein through its entire or any depth between planes drawn vertically downward through the northerly or the southerly end line of said Sixteen to One lode mining claim, or through any of its lines, or extended indefinitely or at all in the direction of any dip of any vein; and it positively denies that defendant has interfered with or made any unlawful entry upon any segment of any vein within the lines of said Sixteen to One mining claim, or of any extension thereof.

4. It denies that any vein described in said complaint as the Sixteen to One vein, or any vein, having its apex within the boundaries of said Sixteen to One Mine, on its downward course or otherwise, departs from the perpendicular or passes through the easterly side line of said Sixteen to One claim, or into or beneath the surface of the said Belmont, or Valentine, or Tightner Extension lode mining claims of this defendant, or any **[33]** part of any thereof, or beneath the said Twenty-One quartz claim owned by this defendant, or beneath any other adjoining mining claims, or that within any lode or vein apexing within said Sixteen to One claim there

has existed at any time mentioned in said complaint or now exists any ore or rock in place bearing gold, or any other valuable minerals, or metals, which ever were or are owned or possessed by plaintiff, or to which plaintiff had or has the sole or exclusive right, or any right, to search for, or to extract or remove; or that defendant ever entered upon any such vein or ore, or that plaintiff was ever in the sole or exclusive possession of any vein or ore beneath the surface of the said Belmont, Valentine, Tightner Extension and Twenty-One claims, or any of them; or that plaintiff was ever in possession of or had the right to the sole or exclusive right, or any right, to search for or extract or remove any ore or rock in place bearing gold, or any valuable metals beneath any of said claims last mentioned.

5. It denies that defendant claims or asserts, or ever claimed or asserted, adversely or in hostility to the plaintiff, or otherwise, any estate, or right, or title, or interest in or to any segment of any Sixteen to One vein, or lode, or to any vein or lode existing, or having its apex, within the boundaries of said Sixteen to One claim; or that in pursuance of any adverse claim or at all, said defendant is now or ever has been wilfully or unlawfully or at all entering upon any part of any extralateral segment of any vein having its apex within the boundaries of said Sixteen to One quartz claim; or that it ever has or now is wilfully or unlawfully, or at all, trespassing upon any segment of any vein having its apex within said Sixteen to One mining claim; and

it denies that it has ever mined, or is now mining, or has **[34]** ever extracted, or is now extracting, or has ever converted, or is now converting, to its own use, any valuable or other ore from any such vein.

6. It denies that any claim it has made to any ores or to any portion of any vein described in said bill is without any right whatever, or that by means of its mine working it has ever extracted or removed from any segment of any vein any of the property, or gold, or gold-bearing ores, or metals, of great value, or anything the property of plaintiff, of the value of one hundred thousand (100,000) dollars, or of any other sum of money whatever, or that it has ever removed any thing of value in which the said plaintiff had any property right; or that it has ever damaged the said plaintiff in the sum of one hundred thousand (100,000) dollars, or any other sum of money whatever.

7. It denies that it has ever trespassed or committed any act alleged or referred to in said bill wilfully or at all, or that it ever had any knowledge that any ores extracted from its said property or from any property as referred to in said bill, or at all, were not its own property; but on the contrary it has always believed and now believes that all of the ores and rock in place of any kind, and values of any kind, extracted by it from the workings situated in its said mines was its own property and not the property of any other person; and it denies that it ever has been engaged in or is still engaged in wilfully, or wrongfully, or at all, extracting or

removing gold or gold-bearing ores or metals the property of the said plaintiff from any segment of any vein having its apex within the boundaries of the said Sixteen to One Mine, or that it wrongfully, or wilfully, or otherwise, or at all, continues in possession of any portion of any vein apexing within the boundaries of said Sixteen to One **[35]** claim.

8. It denies that defendant is now or ever has been mining or extracting any rich or valuable or any ore from any vein described in said bill, or any dip of any vein, or otherwise, or within any extra-lateral segment of any vein belonging to said plaintiff, or at all, as set forth in said complaint, or at all, or that any portion of any mining or extracting of ore by defendant has extended beyond the vertical boundaries of any mining claim to which defendant claims ownership, as herein alleged, or at all, or underneath the surface of any adjoining territory, or beneath the surface of the Eclipse Extension lode, except on a vein apexing within the boundaries of the Twenty-one Mine.

9. It denies that this defendant ever has or intends to, or unless restrained by this Court, will further, or at all, intrude or trespass upon said segment of said vein alleged in said bill, or any segment of any vein the property of plaintiff, or that it intends to or will make further or any mine workings or excavations for the purpose of mining said or any ground, or at all, or extracting or removing from any ground any mineral, or ore, or ore-bearing rock, or metals therein, or at all, or that it intends to or will continue to dig up, or extract, or

remove, from said or any ground the property of said plaintiff, or to convert to its own use, or at all, any mineral, or ore, or ore-bearing rock, or metal, therein, or in any ground or vein the property of plaintiff, or at all, or will take from said or any property of plaintiff the entire or any value thereof, to the great, or irreparable, or any injury of plaintiff.

10. It denies that unless it, or its agents, or servants, or employees, or any of them, are restrained or enjoined from intruding or trespassing upon any vein or ore the property of plaintiff, or from making any cuts, or openings, or excavations, **[36]** thereon, or from digging up, or extracting, or removing, or carrying away, from any property of plaintiff, or any vein or plaintiff, or any segment of any vein of plaintiff, any material, or ore, or ore-bearing rock, or metals, in any property of plaintiff contained, or that the value or substance of any property of plaintiff will be destroyed, or that plaintiff will suffer any irreparable or any injury.

11. It denies that said or any mineral, or ore, or ore-bearing rock, or metals, in said or any vein, or mine, of plaintiff, as described in said bill, constitutes the sole or any value of any property of plaintiff, as described in said Bill or at all.

12. It denies that on the 2d day of August, 1916, or at any other time, plaintiff commenced an action at law against the defendant herein in this court to recover of or from this defendant, the possession of any property, other than an action to recover the sum of one hundred thousand (100,000) dollars,

as damages for certain alleged injuries stated in said complaint, which is hereby referred to.

13. It denies that plaintiff is at all remediless in the premises at or according to the strict rules of the common law, or at all, or can have relief only in a court of equity.

14. It denies that it is necessary to restrain it from doing any acts alleged in said Bill, and denies that it has ever trespassed or committed waste upon any property of plaintiff.

Further answering said Bill, defendant alleges:

15. That ever since the year 1909, defendant has been and now is the owner of those certain quartz or lode mining **[37]** locations situated in the Alleghany Mining District, in the County of Sierra, State of California, and known as the Twenty-one Mine, and consisting of the Twenty-one quartz claim, the Tightner Extension quartz claim, the Belmont quartz claim, and the Valentine quartz claim, and of all the mineral, ore, ore-bearing rock and metal existing and found to exist in said claims by virtue of a due compliance with the laws of the United States and of the State of California pertaining to location, ownership and possession of mining claims, each of said claims having been properly and duly located under the laws of the United States and of this State by the predecessors of defendant, and all prior to said year 1909, the said Belmont, Valentine and Tightner Extension quartz lode claims being the same claims mentioned in the bill of plaintiff herein.

16. That in the year 1909, said defendant ac-

quired the said quartz claims from its predecessors by purchase at a cost of more than thirty-six thousand five hundred (36,500) dollars.

17. That the said claims are all situated upon the same lode and are in one body, and upon the purchase thereof by defendant in the year 1909, the said defendant consolidated all of said claims, and ever since said time the said claims have been worked and used together as one mining claim, and have been called and known as the "Twenty-one Mine."

18. That the south end of said Twenty-one quartz claim commences south of Kanaka Creek, and crossing Kanaka Creek runs northerly toward the center of the ridge dividing Kanaka and Oregon Creeks, and is a full claim of 1500 feet in length.

19. That the said Tightner Extension quartz claim adjoins said Twenty-one on the north, and said Belmont claim adjoins said Tightner on the north, said Valentine claim adjoining [38] said Belmont on the easterly side thereof.

20. That commencing at the south end line of said Twenty-one claim is a vein or lode of quartz rock in place containing gold and other valuable mineral, which said vein, as indicated on the surface by its outcrop, crosses said Kanaka Creek, and runs thence northerly the entire length of said Twenty-one claim, thence out of the north end line thereof and on to and into said Tightner Extension claim, crossing the south and north end lines thereof, and thence on to and into the Belmont claim, and crossing the south and north end lines thereof, the apex of said vein existing and being traceable the entire length

of said claims, except a short distance on the northerly end of said Belmont claim, where the same is covered by a superficial natural deposit of gravel and lava existing at said point, which said vein is known as the easterly or Tightner vein.

21. That there also exists within the boundaries of said Twenty-one claim another vein situated more than one hundred and thirty (130) feet west of said easterly or Tightner vein, and commencing at the southerly end line of said Twenty-one claim, and running thence northerly and through the entire length of said Twenty-one claim out of the northerly end line thereof at a point under the northwest corner thereof, and from thence on to and into the said Sixteen to One claim mentioned in said complaint, and has always been known and designated as the westerly or Sixteen to One vein, and as defendant is informed and believes the part thereof above the north end line of said Twenty-one claim is the same vein claimed by plaintiff as the sole vein existing within the boundaries of said Sixteen to One claim.

22. That it was on account of the presence of said veins and the mineral existing therein that caused the predecessors **[39]** of defendant to locate the said Twenty-one quartz claim, which said Twenty-one quartz claim was located and the development thereof commenced long prior to the location of and discovery of any vein upon the said Sixteen to One claim.

23. That at the time of the purchase of the said Twenty-one Mine of this defendant, the predeces-

sors of defendant in the development of said Twenty-one Mine had commenced a tunnel at about ten feet above the level of said Kanaka Creek and had run the same in following the said westerly or sixteen to One vein a length of about four hundred (400) feet.

24. That upon the said purchase of said Twenty-one Mine by defendant, defendant continued the said tunnel and on said vein to a distance of about five hundred and four (504) feet from the portal thereof, and at said point turned the said tunnel nearly at right angles and to the east, and ran a cross-cut a distance of about one hundred and sixty (160) feet, all through the country rock, at which point it cut a separate and distinct vein from said westerly or Sixteen to One vein, and being the said easterly or Tightner vein, and continued said tunnel on the said easterly or Tightner vein a total distance from the portal of said tunnel to nearly two thousand (2000) feet, crossing the said Twenty-one quartz claim, Tightner Extension and Belmont claims, under and into said Valentine claim, the entire tunnel on said easterly or Tightner vein being run on the said vein without a break in the vein and between distinct and well-defined walls. That said tunnel was run on said easterly or Tightner vein, and on the vein which has its apex and outcrop within the boundaries of said Twenty-one, Tightner Extension and Belmont quartz claims, and is the same vein which apexes and crosses the said Twenty-one, Tightner Extension and Belmont quartz claims

from the south end **[40]** line to the north end line of each of them, and hereinbefore described as said easterly or Tightner vein, and was and is no part of any vein apexing or outcropping within the boundaries of said Sixteen to One vein.

25. That said work of defendant was performed up to about the month of September, 1915, and during said time from 1909 up to said time in 1915 said defendant had made a number of upraises from said tunnel, none to exceed one hundred (100) feet in length, and all on said east vein, and none indicating the presence of any other vein in said vicinity; and had at various times extracted small quantities of ore for prospecting purposes and in opening up the said vein, but in all cases the cost of extraction and reduction and the proper development work applicable thereto largely exceeded the value of the output thereof.

26. That all of said work and development on said easterly or Tightner vein by defendant was done with the utmost good faith and under a belief, which defendant still has, that the same was done on the vein heretofore alleged as outcropping and apexing within the lines of said Twenty-one, Tightner Extension and Belmont quartz claims, and that all of said work and running of said tunnel and the extraction and reduction of said ores was done with the full knowledge of the plaintiff and its predecessors, and said defendant has not damaged the said plaintiff in any sum of money or at all by said work, extraction and reduction of ores, and no part of the said work was done upon any vein apexing within

the boundaries of said Sixteen to One Mine, and none of said ores so extracted or reduced were the property of plaintiff at all.

27. That since the 6th day of October, one thousand **[41]** nine hundred and fifteen (1915), the date of a contract of sale made by this defendant to J. H. Hunt, this defendant has not had possession of and has not worked or mined the said Twenty-one Mine or reduced any of the ores therefrom at all, and that during the life of said contract, which runs until the 6th day of October, one thousand nine hundred and twenty (1920), this defendant does not intend to work said Twenty-one Mine or extract any of the ores therefrom.

WHEREFORE, defendant prays that plaintiff take nothing herein, and that it have its costs; also that defendant have such other and further relief as to this Court may seem equitable.

W. H. METSON,
FRANK R. WEHE,
Attorneys for Defendant. **[42]**

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

L. A. Maison, being first duly sworn, deposes and says:

I am an officer of the corporation, Twenty-one Mining Company, defendant named in the foregoing Answer to Bill of Complaint, to wit, secretary thereof, and I make this affidavit in behalf of said defendant.

I have read the foregoing Answer to Bill of Complaint and know the contents thereof; the same is true of my own knowledge, except as to such matters and things as are therein stated upon information or belief, and as to such matters I believe it to be true.

L. A. MAISON.

Subscribed and sworn to before me this 11th day of August, 1916.

[Seal] D. B. RICHARDS,

Notary Public in and for the City and County of San Francisco, State of California.

Due service and receipt of a copy of the within Answer to Bill of Complaint is hereby admitted this 11th day of August, one thousand nine hundred and sixteen (1916).

WM. E. COLBY,
GRANT H. SMITH,
Attorneys for Plaintiff.

[Endorsed]: Filed August 11, 1916. Walter B. Maling, Clerk. **[43]**

[Title of Court and Cause.]

Affidavit of J. H. Hunt, Filed August 11, 1916.

State of California,
City and County of San Francisco,—ss.

J. H. Hunt, being duly sworn, deposes and says that he is familiar with the workings of the Twenty-one Mine, which mine is in litigation in the above-entitled suit.

That the said mine is under bond to one J. H. Hunt, that is to say, that the said Hunt has a written lease, option and contract in writing from the Twenty-one Mining Company, a corporation, whereby the said Hunt is privileged to buy the said property for the sum of $250,000 at any time within five years from October 6, 1915, one-half of which $250,000 is required by said written bond to be paid by the said Hunt to the said Twenty-one Mining Company within three years from said October 6th, 1915;

That the said Hunt has already paid said corporation the sum of $30,000 on said lease, bond and contract, and that the said Hunt has been in the exclusive possession and operating said property exclusively since on or about the 15th day [**44**] of October, 1915, under and by virtue of said lease, bond and written contract.

At the date of said writing there was a mill on said property of the capacity of 15 tons per day; that since entering into the possession of said property the said Hunt has rebuilt the said mill and has also built another mill of 35 tons capacity per day and that the total capacity of said mills is 50 tons per day, and that the amount of money invested therein is $25,000; that the ore in the stopes upon which work has been enjoined averages about $50 a ton and that the output of said 50-ton mill would be about $2500 per day or about 900,000 per annum and that there is no other ore in said property open which can be stoped and milled.

That there is about 2,000 feet of tunnel leading to

the stopes under injunction herein in which a car track has been laid and which tunnel is more or less timbered; that a contract exists with the Middle Yuba Hydro-Electric Power Company under and by virtue of which contract the said lessee Hunt is obliged to pay to said corporation the sum of $125 per month minimum for electric power for use in said mill whether the said mills are run or not. That said Hunt has been obliged to select special men because some of said ore is what is known as high-grade or picture rock and it is unsafe to allow anyone to work in stopes carrying ores of that character unless they be very reliable, honest and upright miners. That the organization that said Hunt has for this purpose at this time will have to be maintained at a cost of about $1,000 a month and he cannot afford to have this organization disrupted without a loss of said amount. That the depreciation on said mill property is at least $5,000 a year and upon the track and work in said tunnel at least $150 a month; that the going rate of interest in said Sierra County is 7 per cent per year. [45]

That the defendant and his lessee are faced with the contingency that the time within which the said option must be paid out by the said Hunt is running and the money that would be taken from said mine by said Hunt with which to pay the same cannot be forthcoming if an injunction be issued; that the interest on said $900,000 prorated for six months of a year is $31,500 per year. That the depreciation on said mill and workings per year is $6800. That the interest on the capital invested in said mills is $1750

a year, and the interest on the capital invested in said car track, timber and excavations is $1800 a year, or a total of $53,850. That facing a loss of $53,850 per year besides a loss of time and the running of time on the bond herein, an undertaking or indemnity of at least $200,000 should be exacted from the complainant in order to protect affiant should an injunction be granted, so that the parties to said lease and option, who will be injured by said injunction, may be protected adequately against the wrong and injury done by the aggressions of this plaintiff.

J. H. HUNT,

Subscribed and sworn to before me, this 10th day of August, 1916.

FLORA HALL, (Seal)

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed August 11, 1916. Walter B. Maling, Clerk. [46]

[Title of Court and Cause.]

Affidavit of J. H. Hunt, Filed August 14, 1916.

State of California,

City and County of San Francisco,—ss.

J. H. Hunt, being first duly sworn, says:

That he has held and has been in possession of the so-called Twenty-one Mine, situated at Alleghany, Sierra County, California, and has been working the same ever since the 15th day of October, one thousand nine hundred and fifteen (1915), under a con-

tract of sale executed by the said defendant.

That as the vendee in said contract he has been present at the said mine and has actually taken part in the management thereof during the greater portion of the time since said October 15th, 1915, and is familiar with all of the workings in said Twenty-one Mine, as exhibited on the map Exhibit "A" attached to the affidavit of Mr. Edward C. Uren.

That he was present at the said mine a part of the time covered by the examination made by the engineers of plaintiff of a part of said mine and of the Sixteen to One Mine. [47]

Referring to the affidavits of said engineers herein to the effect that they were not permitted to examine the Twenty-one tunnel and were preventd from so doing by the officers of said Twenty-one Mining Company, affiant says:

That within six weeks before the commencement of this action it had been understood between the said plaintiff and this affiant, as the said vendee in said contract and as being the party in possession thereof, that joint surveys of said properties should be made by Edward C. Uren, the engineer of affiant, and said George O. Scarfe, and that all matters should remain in the condition in which they were during said period and until the maps of the said two surveyors were exchanged and the facts represented by said maps understood by each of the said parties.

That on the day said understanding was had and just prior thereto, and on the invitation of this affiant, S. B. Connors, the vice-president of plaintiff

and who verifies the application herein for the restraining order, and the mining superintendent of the plaintiff, one —— Sullivan, were conducted into and through all of the workings of said Twenty-one Mine, and in company with this affiant and his superintendent and foreman, went into the said Twenty-one Mine tunnel from its said portal to its face, and no part thereof was concealed from the said Connors and Sullivan, and the purpose of said visit was to permit the said Connors and said Sullivan to satisfy themselves as to any facts exhibited in the said tunnel, and immediately thereafter all of said parties repaired to the office of said Sixteen to One Mine and consummated the above understanding.

That pending the said understanding and before the [48] same had expired, said Fred Searls, Jr. insisted upon examining said property and requested permission to enter the same, but that affiant as the then exclusive owner of the rights of possession of said property, and having in mind the said understanding, refused to permit permission at said time, but consented to said inspection as soon as the maps of said engineers were exchanged according to said understanding, whereupon and against the consent of affiant, the said Fred Searls, Jr., or someone under his instructions, broke into affiant's said working in said Twenty-one Mine tunnel at about the point near the top of the upraise connecting the Sixteen to One shaft and affiant's workings in said Twenty-one Mine upraise, and thereafter surreptitiously and forcibly, and without affiant's consent, entered in and upon the said workings of affiant.

Affiant further says that it appears from all the maps and plats of said shaft and workings that said plaintiff has, without the consent and often without the knowledge of affiant or said defendant, trespassed underground and beyond the sight of affiant and defendant upon the said Common Law rights of defendant and this affiant as follows:

That without the consent or knowledge of defendant or affiant, it ran a cross-cut, running Easterly from or near the end of Sixteen to One Tunnel No. 2, at Station 18, which was excavated more than two hundred (200) feet across and into the said Belmont quartz claim of defendant, which fact affiant nor said defendant did not learn until the 21st day of June, 1916, the cross-cut evidently having been run to reach the east or Tightner vein apexing within the boundaries of said Belmont claim, but which cross-cut was not run a sufficient distance to reach the same. **[49]**

That also, as appears from the said map Exhibit "B" attached to said affidavit of said Edward C. Uren, and also from said plat Exhibit "B" attached to said affidavit of Fred Searls, Jr., a large portion of the said so-called Sixteen to One shaft is run in country rock and not following any vein at all, and particularly is this so below the four hundred (400) foot level within the boundaries of the Valentine ground, the property of defendant, and a portion of the way on the Belmont ground and on the Tightner Extension ground, and at the present time said plaintiff is working through the said shaft and is extracting ore at a point below the four hundred

(400) foot level and is conveying the same through the said shaft to the surface of the ground and passing in said shaft under the surface lines of said Tightner extension, and being through portions of said shaft which do not follow any vein at all.

That affiant has been informed by his superintendent over the telephone this morning that plaintiff has again commenced the sinking of said shaft in the country rock and away from said vein and under the surface lines of said Valentine quartz claim and from the bottom of the so-called Sixteen to One shaft as the same is delineated on the said Fred Searls, Jr. map Exhibit "B."

J. H. HUNT.

Subscribed and sworn to before me this 14th day of August, 1916.

[Seal] RITA JOHNSON,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed August 14, 1916. Walter B. Maling, Clerk. [50]

[Title of Court and Cause.]

Affidavit of Edward C. Uren.

State of California,
City and County of San Francisco.—ss.

Edward C. Uren, being first duly sworn, deposes and says:

That he is a citizen of the United States and a resident of Nevada City, California.

That he is a mining engineer by profession, has

practiced his profession for a period of eighteen years; and that he has practiced his profession in most of the mining States of the United States.

That he has been in the Alleghany Mining District, Sierra County, California; that he has examined some of the operating mines in that district; that he has examined the Twenty-one Mine, including the Belmont, Tightner extension and Valentine claims, and made surveys underground and on the surface thereof, and has also made surveys on the surface of some of the other mines contiguous thereto; that he has been in the [51] Sixteen to One Mine.

That he is familiar with the shaft on the Sixteen to One Mine and has been down the shaft of said Sixteen to One Mine up the first two raises below the four hundred foot level that was delineated on Exhibit "A" of the map attached of Fred Searls, Jr.

That affiant is familiar with the tunnel commonly known and designated as the Twenty-one tunnel and marked on the said map Exhibit "B" attached to the affidavit of Fred Searls, Jr. as "Twenty-one Tunnel"; that said Twenty-one tunnel is driven on the vein, the top or apex of which, in the opinion of affiant, crops at the surface within the exterior boundaries of Twenty-one Mine; that the croppings or apex of said ledge are delineated on the map attached to this affidavit and marked Exhibit "A."

That in the opinion of affiant the ledge exhibited in the said Twenty-one tunnel is an entirely different ledge from the ledge shown in Tunnel No. 1,

Tunnel No. 2 and 100 foot level of the said Sixteen to One Mine.

That the croppings of said ledge so far as exhibited on the surface and known to affiant are marked upon said map Exhibit "A" hereto attached to this affidavit.

Affiant further says that in his opinion the croppings of the vein, upon which said vein the said Sixteen to One Mine shaft has been started, will on a northerly course cross the westerly side line of the said Sixteen to One Mine at or about the letter "Z" on the said map Exhibit "A" attached to this affidavit.

That affiant has on said map Exhibit "A" attached to this affidavit projected a line parallel to the end line of the [52] Sixteen to One Mine, which said projected line is on said map Exhibit "A" marked "YY."

Affiant further states that the said Sixteen to One vein is exposed at the surface of the earth at the mouth of the said upper tunnel or Tunnel No. 1 of the Sixteen to One Mine, and the said exposure of said outcrop or apex of said Sixteen to One vein crosses the southerly end of said quartz lode claim at said point.

That said outcrop or apex could be seen coursing northwesterly within the boundaries of said Sixteen to One claim for a distance of about 300 feet, same being exposed on the Tightner road; that protecting the course or strike of said vein as shown on the surface, to wit, from the said upper tunnel or Tunnel No. 1 of said Sixteen to One Mine to the place it

stands exposed where the Tightner road cuts it and from that point northwesterly it will, as stated above, pass out on the westerly side line of said Sixteen to One at the said point "Z."

Affiant further says that in his opinion if a raise be driven on the true dip of the vein from the face of the said vein or lower tunnel as shown upon the map Exhibit "A" (attached to the Scarfe affidavit) to follow said Sixteen to One vein upon its upward course on the face of said lower tunnel, will not reach the surface of the bed rock within the limits of the said Sixteen to One claim.

That affiant reiterates in his opinion said apex of said Sixteen to One vein, so called, will pass out of the westerly side line of said Sixteen to One Mine at the point "Z."

Affiant further asserts that the so-called Sixteen to One vein is not continuous from its apex, nor is it shown to be continuous from its apex much below the said Tunnel No. 2, and [53] that the vein is shown below said Tunnel No. 2 and at a point a short distance below the 100-foot level which may be the same vein that is shown in the said shaft at said Tunnel No. 2.

That the Twenty-One tunnel at or near the portal thereof, and as exhibited on Exhibit "A" attached hereto, was started on the same vein as is shown in the croppings on the only vein within the boundaries of said Sixteen to One vein crossing the south end line thereof, and was continued on said vein for a distance of 504 feet; that at said last-named point said Twenty-One tunnel left said so-called Sixteen to

One vein and was then continued as a cross-cut in an easterly direction and through the country rock approximately at right angles from the said Twenty-One tunnel, and was run about 160 feet from the place where said cross-cut began on said so-called Sixteen to One vein; that at said point the said cross-cut intercepted a distinct and separate vein, and being the same vein which is now sought to be attached by the said original Sixteen to One Mine, and which the said Sixteen to One Mine is now claiming.

That the said Twenty-One tunnel was then turned northerly and followed said vein, without break or interruption, to the present face of the said Twenty-One tunnel, all as shown on the said map Exhibit "A" attached hereto.

That on the surface of the said ground, within the lines of said Twenty-One Claim, at a point where Kanaka Creek crosses the said Twenty-One claim, there is shown on the surface two distinct and separate veins, separated by country rock, and about 130 feet distant from each other, the westerly vein being the so-called Sixteen to One vein, being the vein upon which said tunnel as aforesaid, and all of the indications on the [54] ground point to the fact that said easterly vein as it outcrops at Kanaka Creek is the vein cut by said Twenty-One Company at the eastern end of said cross-cut, and which was followed in the said tunnel to the face thereof.

That on the surface of the Twenty-One claim both said easterly and westerly veins can be traced from Kanaka Creek to the north end line of said Twenty-One claim. Both of said veins, as traced on the

ground, and being the apex of said veins, respectively, cross the north end line of said claim, the said westerly vein continuing on into said Sixteen to One claim at a point under the northwest corner of the Twenty-One claim, and the easterly vein crossing into the Tightner Extension claim and thence into the Belmont claim between corners B–1 and B–7 thereof, and from the said points on said creek where said two veins outcrop until they reach the north end line of said Twenty-One claim, said outcrops as exposed on the surface continue, in their northerly course, to diverge so that at the north end line of said Twenty-One claim said outcrops are about 300 feet apart, the said tracing of said apices of said east and west veins being fully delineated on the map marked Exhibit "A" annexed hereto.

That affiant has examined the said vein known as the east vein followed in said Twenty-One tunnel from said point where the same is first cut by said cross-cut run at said 504 foot point from the portal thereof, and has also examined the stopings thereon opening from said tunnel, and all of said stopings opening from said Twenty-One tunnel are on said east vein followed in said Twenty-One tunnel from said cross-cut, and all upraises from said tunnel are on said vein.

That the examination of said Sixteen to One shaft discloses that a large portion of the said shaft below the 400 [**55**] level is run entirely in country rock and is under the surface of the said Valentine claim, constituting a part of the said Twenty-One Mine, and being one of the locations included therein, and

that at the time the same was run and now the said shaft did not follow any vein at all, and that no vein is exposed in the said shaft, all as shown upon Exhibit "B" attached hereto.

Affiant further says that he gave to the said Scarfe a map that was delineated from surveys made by this affiant;

That this affiant notices on the map attached to the Scarfe affidavit, Exhibit "A," that portions of the map made by affiant have been copied or caused to be copied by the said Scarfe; that on the map shown by affiant to the said Scarfe the croppings of the easterly vein, upon which the easterly part of said Twenty-One tunnel is run, are delineated and are shown to be continuous to the northerly end line of said Twenty-One Mine, but that said Scarfe only copied said croppings to a point which affiant marks on the map attached to this affidavit as the point "A"; that upon the map that affiant showed to the said Scarfe the croppings of the said Sixteen to One vein, so-called, shown in the portal of the said Twenty-One tunnel aforesaid were marked as delineated on the map Exhibit "A" attached to this affidavit; that said Scarfe failed to copy the same into his affidavit filed in this court.

EDW. C. UREN.

Subscribed and sworn to before me this 8th day of August, 1916.

[Seal] RITA JOHNSON,

Notary Public in and for the City and County of San Francisco, State of California. [56]

(Here follows map.)

[Endorsed]: Filed August 14, 1916. Walter B. Maling, Clerk. [57]

[Title of Court and Cause.]
State of California,
City and County of San Francisco,—ss.

Counter-affidavit of S. B. Connor.

S. B. Connor, being first duly sworn, deposes and says: That he is the vice-president of the plaintiff corporation, and at one time was the president; that he has been familiar with the operation of said mine for three years last past and has taken a leading part in the management and operation of said mine, and has made it a point to gain information as to other mining operations in the Alleghany Mining District. That he has spent quite a number of years building mills and installing milling plants for mining operations, and by reason of this experience that he has become specially familiar with operating and construction costs and the value of milling plants; that he has read the affidavit of J. H. Hunt, dated August 10, 1916, and filed in the above-entitled action, and relating to the damage that the defendant and said Hunt will suffer in the event that they are restrained from working the ore in dispute.

That affiant has reliable information as to the character of the mills which said Hunt mentions in his affidavit, and has inspected a part of said plant. That it is affiant's opinion that ten thousand dollars [58] is a large valuation to place on said mills, and plant, as its present worth. That said plant cannot

mill efficiently fifty tons of said ore per day, or any amount like it, and probably that twenty-five tons is in excess of what could be actually milled efficiently and economically by said plant. That affiant because of his years of experience is familiar with the life of milling plants and that a depreciation of ten per cent per annum is considered excessive as an allowance for depreciation on such plants. That affiant built the North Star mill and plant at Grass Valley, California, in 1886, and with some changes and alterations it has been running ever since said date and is still running. That the Twenty-one track and tunnel referred to in said Hunt's affidavit if unused would require little repair, and that two hundred and fifty dollars per year would far more than cover such expense. That it would not be considered good mine management to keep a considerable force of men idle for any length of time, and that a reliable keeper to take sole charge of said property could be obtained for approximately one hundred dollars per month.

That the ore bodies in dispute and exposed in the Twenty-one tunnel and workings is very problematic in value, and no one could estimate with any certainty, or any degree of accuracy, what it would be capable of producing, since the ores characteristic of the Alleghany district, and of the territory in question, are extremely variable, the values running in comparatively local shoots, with large areas of low grade material between, the high grade ore occurring in bunches or pockets. That affiant's knowledge and examination of other mines in the districts,

and of the ore occurrences in the ground in question justify him in stating that there is no probability of any such amount of ore existing in the territory in dispute and of the grade stated as is set forth inferentially in said Hunt's affidavit.

That affiant has received from the county clerk of Sierra County what purports to be a copy of the written option referred to by said Hunt in his said affidavit, and that affiant has been informed that this is a copy [59] of the option filed by said Hunt in one of the recent high grade cases of People v. Packard, in Sierra County, wherein said Packard was being prosecuted for the alleged stealing of ore from the territory in dispute in the Twenty-one Mine.

That said J. H. Hunt was at the time of the execution of said alleged option the president of the defendant, and ever since has been; that at the date of said alleged option said Twenty-one tunnel had been extended into the territory here in dispute and that practically all of the mining that has been carried on since said time has been within the disputed ground, and that on various occasions representatives of the defendant have stated to representatives of the plaintiff that said tunnel was not run on the Sixteen to One vein, but on an entirely separate and distinct vein, and that within the past few months representatives of the plaintiff have brought to the knowledge of the defendant the fact that they were working on what appeared to be the Sixteen to One vein, but that defendant did not have positive proof of the fact that they were one and the same vein until the latter part of July, when its incline shaft connected

with the upraise of the Twenty-one tunnel.

That a copy of the option above referred to is attached hereto and made a part hereof.

S. B. CONNOR.

Subscribed and sworn to before me this 14th day of August, 1916.

[Seal] EUGENE W. LEVY,

Notary Public in and for the City and County of San Francisco, State of California. [60]

Contract, October 6, 1915, Between The Twenty-one Mining Co., and J. H. Hunt.

THIS CONTRACT made at the City and County of San Francisco, on the 6th day of October, one thousand nine hundred and fifteen (1915), by and between the Twenty-one Mining Company, a corporation duly organized and existing under and by virtue of the laws of Arizona, party of the first part, and J. H. Hunt, of San Francisco, party of the second part,

WITNESSETH:

THAT WHEREAS the party of the first part is the owner and in possession of the following lode mining claims, to wit:

"Twenty-One Quartz," "Belmont Quartz," "Tightner Extension Quartz" and "Valentine Quartz" lode mining claims, together with the appurtenances, all situated in one group near the town of Alleghany, Sierra County, California, and

WHEREAS, said party of the second part desires to take possession of the said property and to work, mine and improve the same, with a view to the purchase of the same;

NOW, THEREFORE, for and in consideration of the mutual covenants hereinafter made to be kept and performed by the respective parties hereto, it is agreed:

That said party of the first part hereby grants to said party of the second part a lease and option to purchase the above described property upon the terms and conditions hereinafter set forth, provided, however, that it is distinctly understood and agreed that a failure to perform each and every of the conditions of this lease and option shall, at the option of the said party of the first part, subject this lease and option to cancellation.

The terms of this contract of lease and option are as follows, to wit:

That the said lessor, said Twenty-one Mining Company, for and in consideration of the royalties hereinafter reserved and the covenants and agreements hereinafter expressed by the lessee to be made and performed, does hereby demise and let and by these presents does demise and let unto the said lessee all of the said property hereinabove described, to have and to [61] hold the same and to work and mine the same until the 6th day of October, one thousand nine hundred and twenty (1920) unless sooner forfeited and determined through a failure of any of the covenants of this contract.

That in working and mining the said property the said party of the second part shall have the right to extract ores therein and to reduce the same so as to extract the mineral therefrom by any method appropriate to the character of ore mined.

That in consideration of said lease, the lessee covenants and agrees with said lessor as follows, to wit:

To enter upon said mining claims and premises and mine and work the same in a good minerlike manner for the purpose of developing the same into a producing mine and paying the purchase price hereinafter mentioned, and with that in view may extract and work the ores therefrom.

On or before the 1st day of December, one thousand nine hundred and fifteen (1915) said party of the second part to take possession of said mining claim and premises and to commence to work, mine and improve the same with reasonable diligence, and to commence to construct an air-compressor plant and electric power plant, which power plant shall be of sufficient power capacity to run the said compressor plant, the whole to be completed on or before the 31st day of December, 1915.

That said improvements mentioned in the last paragraph shall be situated upon said property and convenient to the tunnel on said property and become part of said property, to the end that the same shall pass to the said party of the first part in case of a forfeiture of this contract.

To well and sufficiently timber all workings on said premises at all points where property or necessary in accordance with good mining and to repair all timbering and to keep in good repair all timbering on said property.

To permit the said party of the first part and its agents to enter into and upon all parts of the workings of said mining claims for the [62] purpose

of inspecting the same, and for the purpose of posting any notices of nonliability for materials furnished, work done or damages under the statutes of this State, and to permit such notices to remain upon the said premises, to the end that said party of the first part may be kept fully informed as to the workings on said property and of the output from the same.

To hold all new discoveries within the lines of said claims for said party of the first part.

That in consideration of the said acceptance of this lease and option and the expenditures to be made thereunder, and the faithful keeping of the covenants hereof, the said party of the second part shall have the right to purchase the said demised premises at any time on or before the 6th day of October, one thousand nine hundred and twenty (1920) for the full sum of two hundred and fifty thousand (250,000) dollars, payable as follows:

One hundred and twenty-five thousand (125,000) dollars on or before the 6th day of October, one thousand nine hundred and eighteen (1918); and the balance of one hundred and twenty-five thousand (125,000) dollars on or before the 6th day of October, one thousand nine hundred and twenty (1920), provided that out of the gross product of all ores extracted from the said property, twenty-five (25) per cent, gross, of all ore yielding fifty (50) dollars, gross, per ton or less shall be the property of said party of the first part, and fifty (50) per cent gross, of all ore yielding above fifty (50) dollars, gross, per ton, shall be the property of said party of the first part.

That all of said royalty shall be paid to said party of the first part and credited on the installment of purchase price next due, and shall apply to all ores extracted.

That in case any ore is extracted from said property and worked, there shall be settlements as to the output of said property at intervals of not to exceed one (1) month, and within fifteen (15) days thereafter the said payment of said royalty shall be made to said party of the first part, whereupon the balance of the said gross product shall be the property [63] of the said party of the second part, and all of said ores and values extracted from said property shall be the property of said party of the first part until such settlement is made.

All payments of said purchase price, either in cash or from said gross proceeds, shall be made at the Bank of California, in the City and County of San Francisco, State of California, to the credit of said party of the first part.

That upon the payment by the party of the second part to the party of the first part of the first payment of one hundred and twenty-five thousand (125,000) dollars on or before October 6th, 1918, and provided said party of the second part shall have up to that time well and faithfully performed all of the covenants of this contract, said party of the first part shall deposit in escrow in the Bank of California a good and sufficient deed of the said property purporting to convey all of the said property to said party of the second part, and shall therewith deposit escrow instructions addressed to the said bank to deliver the

said deed to the said party of the second part upon the payment of the said purchase price hereinabove mentioned at the times and as herein provided, provided that if the terms of this contract are not complied with the said deed shall be returned to said party of the first part, and a joint letter of the parties hereto showing the noncompliance of any of the terms hereof not apparent to said bank shall be conclusive evidence to said bank that the said escrow has not been complied with and shall permit a return of said papers.

That the party of the first part shall have the privilege of selecting one man who is a competent miner, who shall be employed and paid by the party of the second part and who shall have the right and privilege of inspecting all parts of the workings on said premises at all times and who shall also be given the privilege of inspecting all ore or bullion shipments, and reporting to the party of the first part herein. If, however, for any good and sufficient reason said representative of the party of the first part [64] shall quit or be discharged said party of the first part shall have the right to select a substitute to take his place; it being the general intent of this clause that the party of the first part shall at all times have one representative upon the premises in the employ of and paid by the said party of the second part, who shall report to the party of the first part any and all matters concerning the premises and the working thereof and the shipment of the ores therefrom, provided that it is understood that said representative shall work on the said property

and shall be under orders in all other things of the superintendent therein, and shall comply with the reasonable regulations binding all workmen in said mine.

That all of the said working of said property and the reduction of the ores therefrom shall be at the expense of said party of the second part, and said party of the first part shall not be liable in any way therefor, and said property shall not be encumbered by any liens for labor done or materials furnished therefor.

That said party of the first part shall have the right to post on said property the notice of nonliability provided for by the laws of this State, and also a notice that it shall not be liable for any damages for personal injuries to any of the workmen on said property, and in that behalf said party of the second part shall insure all of its workmen in some insurance company as provided for by the Workmen's Compensation Act of this State.

That on or before the 1st day of December, one thousand nine hundred and fifteen (1915) said party of the second part shall take possession of said mining claims and premises and commence work thereon as hereinabove provided, and shall continue to work and operate said mine, performing not less than one hundred and twenty (120) shifts per month continuously thereafter during the life of this agreement. A cessation of such operations continuously for a period of sixty (60) days shall subject this lease and contract to cancellation at the option of the party of the first part, upon written notice to the party of

the second part that if operations are not resumed within fifteen (15) days thereafter, this agreement shall be terminated. **[65]**

That time is of the essence of this contract and if said payments are not made, or if said percentage of said gross proceeds is not accounted for or the said property worked and mined, or if any other condition or term of this contract is not complied with, all as herein provided, by said party of the second part, then all rights hereunder cease and said party of the first part shall re-enter and take possession of all of said property and any added improvements put on or used therewith, and may retain any payment of cash or out of said gross proceeds theretofore made, it being understood that the noncompliance with any of the terms of this contract shall create a forfeiture not only of all rights thereunder, but of all payments, and all property put upon the said mining claims or used therewith, the whole thereupon to become the property of said party of the first part and be forfeited with said payments and rights.

It is further understood by and between the parties to this contract that said party of the second part has full information of the action of William Flinn vs. Twenty-One Mining Company, and others, that in case final judgment is recovered in said action by the plaintiff therein which in any way encumbers said property, or any part thereof, or in any way subordinates this contract to the lien of said judgment, that in case said party of the first part does not immediately satisfy the same that said party of

the second part shall have the right to satisfy the said judgment and charge the cost of same to any installment of said purchase price then due or which may become due.

That said party of the first part shall proceed at its own expense with the patent proceedings now pending for obtaining the patent of the United States to the above group of mines, and shall likewise at its own expense defend any actions which may be commenced concerning the *title said* property, in said patent proceedings.

That this contract is an option and not a contract to purchase, and said party of the second part has the right to abandon the same at any time without penalty other than the forfeitures above provided. [66]

IN WITNESS WHEREOF, the party of the first part has caused this contract to be executed by and through its president and secretary and under its corporate seal, and the party of the second part has hereunto set his hand and seal the day and year first above written.

[Seal] TWENTY-ONE MINING COMPANY.

By J. H. HUNT,
President.

L. A. MAISON,
Secretary.

J. H. HUNT.

We, the undersigned, constituting a majority of the board of directors of the Twenty-one Mining Company and owning jointly more than two-thirds

of its capital stock, hereby agree to the execution of the foregoing option and contract and agree to vote at the next meeting of the board of directors of said Twenty-one Mining Company to ratify, confirm and approve the same.

J. H. HUNT.
F. M. PHELPS.
MANSFIELD LOVELL.

[Endorsed]: Filed August 14, 1916. Walter B. Maling, Clerk. [67]

[Title of Court and Cause.]

Counter-affidavit of Andrew C. Lawson.

State of California,
City and County of San Francisco,—ss.

Andrew C. Lawson, being first duly sworn, deposes and says:

That he is a citizen of the United States, and a resident of Berkeley, California;

That he is a geologist by profession and has practiced his profession continuously for a period of thirty-three (33) years; that he received his scientific education at the University of Toronto and at John Hopkins University, Baltimore, Maryland; that he has practiced his profession in Canada, Alaska, the Western States of the United States, Mexico and Central America; and that he has pursued geological studies of mines in Europe and Asia; that for twenty-six years he has been professor of geology and mineralogy in the University of California; that he is at present Dean of the College of Mining in the

University of California; that in the practice of his profession and in the teaching of [68] students he has given particular attention to ore deposits and has studied many quartz mines in California and elsewhere.

That on the 10th, 11th and 12th days of August, 1916, he examined the Sixteen to One Mine for the purpose of determining the position of the apex of the vein exposed and exploited in the said mine with relation to the boundary lines of the Sixteen to One quartz lode mining claim, and for the further purpose of determining the relation between the vein exposed and exploited in the workings of the Sixteen to One Mine and the vein exposed and exploited in the workings of the Twenty-One Mine; that in the pursuit of this inquiry he also examined the workings of the Twenty-One Mine and the vein exposed therein.

Affiant declares that the vein known as the Sixteen to One vein is exposed at the surface of the earth at the portal of the tunnel known as the Number One tunnel of the Sixteen to One Mine, as the same is delineated upon the map, Exhibit "A," accompanying the affidavit of George O. Scarfe, previously filed; that said exposure is on the Sixteen to One quartz lode mining claim, close to the southeast end line of said claim; that within the said Number One tunnel the vein is continuously exposed for a distance of two hundred and seventy-five (275) feet to the face of the tunnel, with a course or strike of N. 40 degrees W. and an average dip to the northeast of about 30 degrees; that the said Number One tun-

nel and the exposure of the vein throughout its length, are wholly within the boundaries of the Sixteen to One quartz lode mining claim; that in the said Number One tunnel at a point 100 feet in from the [69] portal a raise has been made upon the vein, the top of which raise, at the time when affiant last saw it, was thirty-eight (38) feet above the floor of the said tunnel, or within about twenty-five (25) feet of the surface measured along the dip of the vein; that said raise was wholly in the vein and exposed much quartz continuously from the tunnel to the top of the raise.

Affiant further declares that he carefully examined the surface of the ground for exposures of the apex of the vein on the hillside above the portal of the said Number One tunnel and saw several small exposures of quartz one of which he believes to be the outcrop of the vein, but owing to the obscurity of the ground and the lack of trenches he could not trace the course of the outcrop or apex at the surface; affiant further declares that a large portion of the area of the Sixteen to One mining claim is occupied by ancient stream gravel and volcanic rocks, which mantle the bedrock surface where the vein on its upward course may be reasonably expected to emerge and that it is "blind" for a great portion of its extent.

Affiant further declares that, notwithstanding the obscurity of the surface and the mantle of stream gravel and volcanic material, there can be no reasonable doubt of the fact that the top or apex of the vein lies wholly within the boundaries of the Sixteen

to One claim for a distance of several hundred feet measured northwesterly from the portal of the said Number One tunnel at the southeast end line of the claim; that his deliberate opinion, based on the observed feature of the vein, its strike and dip, as exposed in the said Number One tunnel, and other [70] workings of the mine is that the top or apex of the vein lies wholly within the boundaries of the Sixteen to One quartz lode mining claim for a distance of at least seven hundred (700) feet, measured northwesterly from the southeast end line of the said Sixteen to One claim, and the probabilities are that it continues for a great distance within the surface boundaries of said claim;

Affiant further declares that he has continuously followed and observed the Sixteen to One vein from the said Number One tunnel down the dip through raises and stopes to the Number Two tunnel, as the same is delineated on Scarfe's Map Exhibit "A," accompanying his affidavit previously filed.

Affiant further declares that except for the cross-cut adit of about one hundred and twenty-five (125) feet in from the portal to where the vein is encountered and except for the east cross-cut near the end of the tunnel, said Number Two tunnel follows the Sixteen to One vein to its face exposing it continuously, with a somewhat varying course, for a distance of over eight hundred (800) feet;

Affiant further declares that at the northwest end of the said Number Two tunnel a raise is now being driven and that when he last examined this raise it was at the then top about ninety (90) feet above the level, measured on the dip, and that the raise ex-

posed the vein continuously to the top, the angle of dip in the raise being 50 degrees;

Affiant further declares that from the said Number Two tunnel he has followed and observed the vein continuously on the dip down the Sixteen to One shaft as the same is delineated upon Scarfe's Map Exhibit "A," accompanying [71] his affidavit previously filed, to the 100-foot level, and has observed the vein not only in the shaft, but also in three intermediate levels between Number Two tunnel and the 100-foot level, two on the north side and one on the south side of the shaft; that on the 100-foot level the vein is chiefly immediately below the shaft, and is well exposed in the drifts to the north and to the southeast and in raises therefrom; but that in the shaft, and separated from the main vein by a horse a few feet thick, is a hanging-wall branch or spur of the vein.

Affiant further declares that from the 100-foot level he has followed and observed the vein continuously on the dip down the Sixteen to One shaft to the 150-foot level at which level it is dislocated by a fault having a strike of about N. 20 degrees W. and practically vertical; that on the north side of the shaft, just inside the northwest drift from the 150 station, the abutment of the vein upon this fault is well exposed, and that on south side of the shaft the same abutment is seen a little above the station, the fault crossing the shaft obliquely.

Affiant further declares that in descending the shaft from the 150-foot level, on the east side of the fault, he first encountered the country rock of the

hanging-wall for a few feet and then the faulted segment of the small hanging-wall spur or branch of the vein above referred to, and then country rock to a point ten feet below the 200-foot level, at which point the upper side or hanging-wall of the faulted segment of the main vein was again encountered on the lower side of the shaft, and was thence followed and observed continuously down the shaft on the dip to the 300-foot [72] level.

Affiant further declares that between the 200-foot level and the 300-foot level the dip of the vein is at a lower angle than the inclination of the working shaft, so that the vein passes into the floor of the inclined shaft 10 feet below the 200 station, and abuts upon the fault above referred to about 20 feet back of the shaft, as is clearly shown in a raise from the 250 level.

Affiant further declares that, from a consideration of the phenomena observed and here in part recited, it is his deliberate opinion that the Sixteen to One vein has suffered a dislocation or minor displacement on the fault exposed at the 150-foot level, the vertical component of which is about thirty-five feet, and that this displacement in no way obscures the identity of the faulted segments as portions of one and the same vein.

Affiant further declares that the Sixteen to One vein, which he followed in the shaft on the dip and observed to the 250-foot level, below the aforesaid minor displacement, is continuously exposed in both drifts from the 250 station to the respective faces of these drifts, the length of the north drift being over

five hundred (500) feet, and that of the south drift sixty (60) feet, and is further exposed in raises above these levels.

Affiant further declares that the Sixteen to One vein which he followed continuously on the dip in the shaft from the 250-foot level to the 300-foot level is at the station of the latter level again displaced by a minor fault; that at the station the quartz of the vein may be seen in good exposure to abut on its downward course against [73] the aforesaid fault, the quartz being absent on the northeast side of the fault by reason of a slight down throw on that side; but that about 20 feet down the shaft below the 300-foot station the down thrown segment of the vein is again encountered, with a smaller angle of dip than the inclination of the shaft, so that it passes beneath the shaft at the station, and is due to abut on its upward course upon the aforesaid fault not more than ten (10) feet below the 300-foot station.

Affiant further declares that, from a consideration of the phenomena observed and here in part recited, it is his deliberate opinion that the Sixteen to One vein has suffered a minor displacement, the vertical component of which is about 15 feet, and that the displacement in no way obscures the identity of the faulted segments as portions of one and the same vein.

Affiant further declares that from a point 20 feet below the 300-foot station measured along the length of the shaft he followed the Sixteen to One vein on its downward course and observed it in the shaft to a point about 70 feet below the 400-foot station, at

which point the vein, its angle of dip being less than the inclination of the shaft, passes into the roof of the inclined shaft.

Affiant further declares that from the aforesaid point, about 70 feet down the shaft from the 400-foot station, to the bottom of the shaft the Sixteen to One vein is over the shaft; that he observed it in this position in three short raises run into the roof of the shaft, the first of these being about 140 feet down from the 400-foot station where the vein is exposed for a thickness of five (5) **[74]** feet of solid quartz and two (2) feet of crushed vein matter, the footwall of the vein being twelve (12) feet above the floor of the inclined shaft, measured in a direction at right angles to the direction of dip; the second raise being eighty (80) feet further down the shaft, where the vein is exposed for a thickness of five (5) feet, of which three (3) feet is ribboned quartz, the footwall of the vein being 20 feet above the floor of the inclined shaft, measured at right angles to the direction of dip; and the third raise being 55 feet further down the shaft and near the bottom of the shaft, where the vein is exposed about 25 feet above the bottom of the shaft, measured in a direction at right angles to the dip.

Affiant further declares that at the top of the last-mentioned raise from the bottom of the shaft he passed through a short drift driven in the vein to another raise on the vein from the Twenty-one tunnel; that he descended this raise following the vein on its dip and observing it continuously to the level of the Twenty-one tunnel, at a point between Stations 41 and 42 of Scarfe's Map, Exhibit "A."

Affiant further declares that the vein which he thus followed practically continuously, except for two minor faults, from its apex on the surface of the earth, at the portal of the Number One tunnel of the Sixteen to One Mine, to the Twenty-one tunnel level is the same vein as that exposed in the Twenty-one tunnel from Station 16, as marked on Scarfe's Map. Exhibit "A," to the face of said Twenty-one tunnel beyond Station 48 of the same map; that from Station 16 to the face of the tunnel he has followed the vein on its strike and observed it continuously; that there is no essential [75] interruption in the continuity of the vein from the Number One tunnel of the Sixteen to One Mine to the Twenty-one tunnel, nor any reason to doubt its identity throughout; that there is no change in its physical characteristics, mineral contents, character of walls, general dip and strike or in any other feature to suggest that there may be two veins and not one.

Affiant states that he has read an affidavit of Ed. C. Uren, dated August 8th, 1916, to which are attached Map Exhibits "A" and "B" and examined said maps; that the course of the apex of the Sixteen to One vein after it crosses the southerly end line of the Sixteen to One claim will naturally bear to the northwest for a short distance owing to the fact that the surface of the bedrock rises rather steeply as one travels northerly but that when the gravel channel is encountered the original bedrock surface now covered by the gravels and volcanic material becomes much flatter and the slope may even be reversed which will result in causing the course of the "blind"

outcrop or apex of the Sixteen to One vein underneath the gravels to bear more nearly to the north or more nearly parallel to its true strike as revealed in the drifts of the Sixteen to One Mine. Affiant further states that there are no mine workings or exposures and nothing to suggest that there is any vein occupying the position of the steeply dipping vein indicated on said Uren cross-section, Exhibit "B" between the so-called "Twenty-one outcrop" and the point down the Sixteen to One shaft below the 400 level.

(Signed) ANDREW C. LAWSON.

Subscribed and sworn to before me, this 15th day of August, 1916.

[Seal] FLORA HALL,

Notary Public in and for the City and County of San Francisco, State of California. [76]

[Endorsed]: Filed Aug. 16, 1916. Walter B. Maling, Clerk. [77]

[Title of Court and Cause.]

Counter-affidavit of S. B. Connor, Filed August 16, 1916.

State of California,
City and County of San Francisco,—ss.

S. B. Connor, being first duly sworn, deposes and says: That he is the vice-president of the plaintiff company and for upwards of three years last past has taken a leading part in the operations of said mine; that in April, 1913, at a time when said affiant had a very small interest in said company, a

cross-cut from the Number Two tunnel level was started to the east and which penetrated beneath the surface ground now claimed by the defendant; that said affiant had no part in the active management at that time and said work was entirely conducted under a previous mine management; that said affiant talked the matter over with some of his associates at that time and they thought it was absolutely foolish and not proper development work, but in spite of this opinion said cross-cut was driven easterly until some time in October, 1913, when work was stopped, and no work [78] has been prosecuted since said time in driving the said cross-cut further. And affiant declares that no vein was ever encountered in said cross-cut and no ore was ever extracted therefrom.

That said affiant has had an experience extending over forty years in the development of mines and the running of mine workings and that it is the universal practice in following a vein either horizontally or on its inclination to drive such working on a more or less straight course rather than to follow all of the undulations and rolls of the actual vein so long as the working keeps in close touch with the vein; that it would be a practicable and economic impossibility to follow all the sinuosities of the vein and keep the working entirely within the vein, more especially in the sinking of an incline shaft and in the case of a working incline shaft a nearly straight course must be followed in order that the necessary track and working of hoisting, etc., can be carried on efficiently. Where the general course of the vein

changes abruptly, a change of direction in the shaft will naturally follow in order to keep in close touch with the vein. In sinking the incline shaft on the Sixteen to One vein the superintendent at the mine used his best judgment in following the vein, and that the departure of the shaft from the vein is not greater than will be justified in economic and practical mining. The only idea in sinking said incline shaft was to follow the vein.

S. B. CONNOR.

Subscribed and sworn to before me this 16th day of August, 1916.

[Seal] EUGENE W. LEVY,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Aug. 16, 1916. Walter B. Maling, Clerk. [79]

[Title of Court and Cause.]

Counter-affidavit of William A. Simkins.

State of California,
City and County of San Francisco,—ss.

William A. Simkins, being first duly sworn, deposes and says:

That he is a citizen of the United States and a resident of Reno, Nevada.

That he is a mining engineer by profession, and has practiced his profession continuously for a period of eleven (11) years; that he received his technical training at the University of Michigan, and

has practiced his profession in most of the mining states of the United States.

That he has on two occasions visited the Sixteen to One Mine, Inc., and that on the 13th and 14th days of July, also on the 10th, 11th and 12th of August, 1916, he examined the said Sixteen to One Mine for the purpose of investigating the position of the apex of the vein exposed in the said mine with relation to the boundary lines of the Sixteen to One [80] quartz lode mining claim and the relation between the vein exposed in the workings of the Twenty-one Mining Company. And affiant further declares that he has examined said workings of said Sixteen to One Mine and the workings of said Twenty-one Mine lying underneath the surface lines of the Twenty-one, Valentine and Eclipse Extension, and other adjoining mining claims which workings are exhibited on the map Exhibit "A" accompanying the affidavit of George O. Scarfe.

That he has read the affidavit of Ed. C. Uren filed by defendant and has examined Map Exhibits "A" and "B" attached thereto.

Affiant declares that the apex of a vein known as the Sixteen to One vein is exposed in the entrance to the working known as tunnel Number One, which is at the southerly end line of the said Sixteen to One claim. That said tunnel Number One follows and exposes said Sixteen to One vein for the entire length of said tunnel Number One from the mouth to the face of said tunnel. That such opening determines the strike of said Sixteen to One vein in a horizontal plane at the elevation of said tunnel level and

that the strike of said Sixteen to One vein is N. 40° W. and that said vein departs from the horizontal on its upward course to the SW. with an average dip of 30 degrees.

Affiant further declares that the strike of the apex of said Sixteen to One vein at the surface departs from the strike of said tunnel Number One at an angle of 30 degrees to the west. That said departure of strike is due to the configuration of the hill which rises abruptly above the entrance to said Number One tunnel. That said apex continues in the direction of N. 70 degrees W. for a distance of approximately [81] 150 feet, where the contour of the hill is changed to a strike of approximately N. 20 degrees W. by a gulch, which gulch has a general course of S. 20 degrees east. That owing to the change in contour occasioned by said gulch, the course of the outcrop of said Sixteen to One vein would be deflected easterly on its northward continuation until it passes under a gravel channel which overlies the original country rock in which said Sixteen to One vein is contained. That the said gravel channel lies upon a roughly level surface and that the course of the outcrop of said Sixteen to One vein under the said gravel channel would be roughly parallel to the said tunnel Number One; and that it is his opinion, based upon all of the facts shown, that the apex of the said Sixteen to One vein lies wholly within the surface boundaries of the said Sixteen to One lode mining claim and will pass through both end lines thereof; that if the apex of said Sixteen to One vein shall be found on further exploration to depart through the westerly side line of said claim,

the point of such departure will be more than 750 ft. northerly of the point where said vein enters the southerly end line of said Sixteen to One claim. That this is a fact is further established by the upraise now being driven from the extreme northerly face of the Number Two tunnel which raise was 90 feet upon the incline exposing the Sixteen to One vein continuously with an average dip of 50 degrees which if projected up to the old bedrock surface underlying the gravel channel will apex not far from the center or lode line of the Sixteen to One claim and about 720 feet northerly of the southerly end line of said Sixteen to One claim.

Affiant further declares that he examined the [82] surface ground lying to the south of the southerly end line of said Sixteen to One claim and could find no outcrop or apex of any vein for a distance of several hundred feet owing to a covering of soil, loose rock and underbrush. That it is extremely doubtful if any apex can be traced on the surface as indicated by the red line marked "Apex of Sixteen to One vein" on the said Exhibit "A" accompanying affidavit of deponent Edward C. Uren, and that said red line is a theoretical and conjectural line for a great part of its length.

Affiant further declares that said Sixteen to One vein can be traced continuously from said tunnel Number One downward on its dip, in the Sixteen to One shaft, or closely connected workings, to the 150-ft. level where said vein is displaced downward thirty feet by a fault which is nearly vertical. That the said Sixteen to One vein is observable below said

fault at a point in said shaft fifteen feet below the 200-ft. level and is thence visible in said shaft on its downward course to the 400-ft. level. That the said Sixteen to One shaft has been enlarged beyond its normal size for a distance of 20 feet below the said 400-ft. level by excavation in the hanging-wall of said shaft, and that said Sixteen to One vein is plainly visible in said excavation. That said vein where exposed in said excavation has a dip of 25 degrees to the east and has all other features of regularity and similarity which are visible in said shaft above. That said Sixteen to One vein is again exposed in the top or hanging-wall side of said shaft at a point 80 feet downward from said 400-ft. level; and that there is no apparent change in the country rock below said 400-ft. level, and that there are no workings whatsoever to show a sudden upward turning [83] of the so-called Twenty-one vein or of any vein, as indicated by the broken red line on Exhibit "B" accompanying affidavit of said Edward C. Uren.

That the working known as the Twenty-one tunnel has its entrance at the apex of a vein and that said tunnel follows said vein for a distance of 504 feet. That said vein has an average dip of 50 degrees from the horizontal upward to the west for the first 90 feet of said tunnel and that said vein gradually assumes a vertical position as it is followed northward in said Twenty-one tunnel for a distance of 370 feet and that the said vein turns over at said 370 ft. north from the portal of said tunnel and dips eastward on its upward course and at the northerly exposure of said vein in said tunnel its dip is 80 degrees; that at a point 504 ft. northerly from the portal of said tun-

nel, the said tunnel was turned to the east and cross-cut the country rock for a distance of 160 ft. that at the easterly end of said cross-cut, a second vein was encountered and that from said point the said tunnel has been driven in a northwesterly direction several hundred feet and to its extreme face has been driven continuously on said vein which is the same vein which apexes in the Sixteen to One claim and described hereinbefore.

Affiant further declares that the Sixteen to One vein, which is exposed in the entrance to the working tunnel known as Tunnel No. 1, of said Sixteen to One Mine, which is at the southerly end line of the said Sixteen to One claim, is the same vein which is followed horizontally in said Sixteen to One Tunnel No. 1 from the mouth to the face of said tunnel a distance of 290 feet; that the Sixteen to One shaft follows down on said vein, or immediately adjacent thereto, [84] continuously, except for two minor faults, from the top to the bottom of said shaft, and into the main Twenty-one tunnel, and that said Twenty-one tunnel follows said vein from the point where the shaft connection is made to the face of said Twenty-one tunnel a distance of 290 feet; that the same vein was followed on its course or strike N. 40 degrees W. in Sixteen to One Tunnel No. 2 from the said Sixteen to One shaft to the face of said Sixteen to One Tunnel No. 2, a distance of 650 feet; that there is no reason to doubt that the said Sixteen to One vein is the only vein exposed in all of said workings in the said Sixteen to One Mine, and in the workings of the Twenty-one Mine, from

the point where the Sixteen to One shaft connects with said tunnel; that in the opinion of affiant, there is nothing in the said workings of either of said mines to indicate the presence of any, other than the said Sixteen to One vein, except in the southerly end of the said Twenty-one claim, a distance of approximately 1100 feet from the workings above described.

Affiant further declares that there is nothing in the mine workings of either the Twenty-One Mine or of the Sixteen to One Mine, nor in the geological conditions shown therein, to suggest the presence of the steeply dipping vein, which is projected in a dotted red line, upon the map known as exhibit "B" attached to the affidavit of Ed. C. Uren, and which is made to appear as extending downward almost vertically from a point on the surface on the Belmont claim, to a point in or immediately above said Sixteen to One shaft, at a point 300 feet upward in said shaft from the Twenty-One tunnel. [85]

Affiant further declares that it is the usual practice to run mine workings in or near the vein and that where the vein has many undulations it would be impractical and uneconomic to follow all the variations of the vein, but the miner does the best he can.

WILLIAM A. SIMKINS.

Subscribed and sworn to before me this 16th day of August, 1916.

[Seal] FLORA HALL,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Aug. 16, 1916. Walter B. Maling, Clerk. [86]

[Title of Court and Cause.]

Notice of Motion to Compel Defendant to Furnish Bond Pending Litigation.

To the Twenty-one Mining Company, a Corporation, Defendant, and to Frank R. Wehe & W. H. Metson, its Attorneys:

You will please take notice that the plaintiff in the above-entitled action will through its attorneys on Monday, September 9th, 1916, at 10 o'clock A. M. or as soon thereafter as counsel can be heard at the courtroom of the above-entitled court in the City and County of San Francisco, move the Honorable Court to make an order compelling said defendant to furnish a bond in the sum of thirty thousand ($30,000) dollars with sureties to be approved by a Judge of the said court and conditioned upon the payment of such costs and damages as may be incurred or suffered by the plaintiff or by any party who may be found to have been wrongfully injured by reason of said plaintiff's refraining from mining ores in the disputed territory and conseqeuent inability to operate its plant as pending this litigation, and for such further relief as to said Court may seem meet and equitable. [87]

Said motion will be based on the pleadings and other papers already on file in this action and on the affidavit of S. B. Connor filed herewith.

Dated October 3d, 1916.

WM. E. COLBY,
GRANT H. SMITH,
Attorneys for Plaintiff.

Copy received this 3d day of October, 1916.

WM. H. METSON,
FRANK R. WEHE,
Attorneys for Defendant.

[Endorsed]: Filed Oct. 3, 1916. Walter B. Maling, Clerk. [88]

[Title of Court and Cause.]

Memorandum Opinion.

WILLIAM E. COLBY and GRANT H. SMITH, for Plaintiff.

W. H. METSON and FRANK R. WEHE, for Defendant.

VAN FLEET, District Judge.

Further consideration of the showing made on the defendant's application to dissolve the preliminary injunction heretofore granted plaintiff satisfies me that the facts make the case one for a reciprocal or cross-injunction, within the principles stated in Maloney vs. King, 76 Pac. 939, 940, and Johnson vs. Hall, 9 S. E. 783, cited by plaintiff, rather than for the application of the rule contended for by defendant.

This conclusion, I find, coincides with the views of Judge Hunt, before whom the matter was partially heard and with whom, as suggested at the argument, I have taken occasion to confer.

Accordingly the motion to dissolve the injunction will be denied; but a cross-injunction may be had restraining the plaintiff pending the suit from further prosecuting mining operations on the disputed

vein upon defendant giving a bond in the sum of $30,000 to indemnify plaintiff against any damages suffered by plaintiff from such restraint.

[Endorsed]: Filed December 15, 1916. Walter B. Maling, Clerk. [89]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 15th day of December, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 292—EQUITY.

ORIGINAL SIXTEEN TO ONE MINE, INC.

vs.

TWENTY-ONE MINING CO.

Order Denying Defendant's Motion to Dissolve Preliminary Injunction, etc.

Defendant's motion to dissolve the preliminary injunction heretofore granted plaintiff, having been submitted and being now fully considered and the Court having filed its memorandum opinion, it is ordered that said motion be denied but a cross-injunction may be had restraining the plaintiff pending the suit from further prosecuting mining operations on the disputed vein upon defendant giving a bond

in the sum of $30,000 to indemnify plaintiff against any damages suffered by plaintiff for such restraint. [90]

[Title of Court and Cause.]

Defendant's Proposed Bill of Exceptions on Appeal from Order Refusing to Dissolve Preliminary Injunction Heretofore Entered in Said Suit.

BE IT REMEMBERED that on the 22d day of August, 1916, at the hour of 3:30 o'clock P. M., the Honorable WILLIAM C. VAN FLEET, District Judge of the above-entitled court, issued a preliminary injunction in the above-entitled action directed to the defendant Twenty-one Mining Company, its officers, agents, servants, employees and attorneys and those in active concert or participating with said defendant, which said preliminary injunction is in words and figures following, to wit:

[Title of Court and Cause.]

PRELIMINARY INJUNCTION.

Plaintiff's application for a preliminary injunction having been presented to this Court and having regularly come up for hearing and both parties having been represented by counsel and affidavits and authorities having been filed on behalf of each party, and said matter having been submitted and the Court having given due consideration to the same, and it [91] appearing to this Court from said affidavits and the pleadings of the respective parties on file herein that there is reasonable ground for issuing a preliminary injunction and that plaintiff has at least

made out a *prima facie* ownership of the Sixteen to One mining claim and to the apex of the vein existing in said claim for a length of at least seven hundred and fifty feet from its southerly end line and the right to follow the same on its downward course between the planes hereinafter defined and that defendant or those acting under it through its Twenty-one tunnel and workings has penetrated said segment of said vein and was up to the time of the issuance of the temporary restraining order by this Court in this matter engaged in mining, extracting and removing of quantities of gold ore therefrom, much of which ore occurs in rich shoots and pockets of local extent, and large values amounting to thousands of dollars can be extracted within a very short time, and after its removal no evidence remains of the value or grade of the ore so extracted and which mining unless enjoined *pendente lite* will produce great and irreparable injury and damage to plaintiff in the event that on the trial of the issues the plaintiff should succeed in establishing its allegations; upon consideration whereof a temporary injunction is allowed, and

IT IS ORDERED that the defendant, the Twenty-one Mining Company, its officers, agents, servants, employees and attorneys and those in active concert or participating with said defendant be and they are hereby enjoined until further order of this Court, from further working or mining or extracting or removing ore or milling or treating or otherwise disposing of any ore extracted from any portion of that segment of the vein which is disclosed

in the main incline shaft of the plaintiff and in the tunnel and other workings of the defendant between a vertical plane passed through the southerly end line of the Sixteen to One claim, which line is described as commenced at a point whence the quarter section corner between Section 34, Township 19 North, Range 10 East, M. D. M., and Section 3, Township 18 North, Range 10 East, M. D. M., bears 15 degrees 50 minutes East 431 feet distant; and thence [92] said end line runs south 54 degrees 18 minutes West 353.7 feet to the southwest corner of said Sixteen to One claim, and another vertical plane situated parallel thereto and distant 750 feet northwesterly therefrom, both of said planes being extended indefinitely in a northeasterly direction.

This preliminary injunction shall not take effect until plaintiff shall enter into a good and sufficient bond in the sum of thirty thousand dollars ($30,000) *dollars,* with Sureties to be approved by a Judge of said court, to be filed with the clerk of said court, conditioned upon the payment of such costs and damages as may be incurred or suffered by the defendant or by any party who may be found to have been wrongfully enjoined or restrained thereby.

Dated San Francisco, California, August 22d, 1916, 3:30 o'clock P. M.

(Signed) WM. C. VAN FLEET,
District Judge. [93]

That thereafter the said defendant presented its bond in the sum of thirty thousand dollars ($30,000) as provided for in said preliminary injunction, which said bond was approved by the said Honor-

able William C. Van Fleet, District Judge, and filed.

That thereafter the defendant served upon the plaintiff its Notice of Motion to dissolve the preliminary injunction, which said Notice of Motion is in the words and figures following, to wit: **[94]**

[Title of Court and Cause.]

Notice of Motion to Dissolve Preliminary Injunction.

To the Original Sixteen to One Mine, Inc., a Corporation, Plaintiff, to and William E. Colby and Grant H. Smith, Its Attorneys:

You will please take notice that the defendant in the above-entitled action will, through its attorneys, on Monday, the 20th day of November, 1916, at 10 o'clock A. M., or as soon thereafter as the matter can be heard, at the courtroom of the above-entitled court in the United States Postoffice Building in the City and County of San Francisco, move the Honorable Court to make an order dissolving the preliminary injunction heretofore made and entered in the above-entitled action on the 22d day of August, 1916, at the hour of 3:30 o'clock P. M.

Said motion will be made upon the ground that the plaintiff has violated and is violating the said injunction in that the said plaintiff has been and is now mining rich and valuable gold ore from the said premises covered by the said preliminary injunction and from the same vein that the defendant was and is restrained from working by means of the provisions of the said preliminary injunction, and the said plaintiff is so as aforesaid working in the same

within the lines of the Belmont Lode Mining Claim drawn vertically downward, which said lode mining claim is the property of and belongs to the Twenty-one Mining Company, the defendant herein.

Upon said motion defendant will rely upon and use all the papers, pleadings, maps and documents on file in said action, this order and the affidavit of J. H. Hunt, which is herewith served upon you, and upon such oral evidence as the defendant may deem advisable to introduce upon the order of the Court.

W. H. METSON,
FRANK WEHE,
Attorneys for Twenty-one Mining Company, a Corporation. [95]

—which said Notice of Motion was based upon the affidavit of J. H. Hunt, which was also served upon the said plaintiff, and which affidavit is in the words and figures following, to wit: [96]

Affidavit of J. H. Hunt.

State of California,
City and County of San Francisco,—ss.

J. H. Hunt, being first duly sworn on oath, deposes and says:

That on the 22d day of August, 1916, at about the hour of 3:30 o'clock P. M. there was issued in the above-entitled cause an injunctive order restraining the defendant, its officers, agents, servants, employees and attorneys and those in active concert or participating with defendant from further working or mining or extracting or removing ore or milling or treating or otherwise disposing of any ore extracted

from any portion of that segment of the vein which is disclosed in the main incline shaft of the plaintiff and in the tunnel and other workings of the defendant between a vertical plane passed through the southerly end line of the Sixteen to One claim, which line is described as commencing at a point whence the quarter section corner between Section 34, Township 19 North, Range 10 East, M. D. M., and Section 3, Township 18 North, Range 10 East, M. D. M., bears 15° 50′ East 431 feet distant; and thence said end line runs south 54° 18′ West 353.7 feet to the southwest corner of said Sixteen to One claim, and another vertical plane situated parallel thereto and distant 750 feet northwesterly therefrom, both of said planes being extended indefinitely in a northeasterly direction.

Affiant further says that he was in the underground workings of the Sixteen to One Mine, Incorporated, on, to wit, the 12th day of November, 1916. That he discovered that within approximately the past thirty days said Sixteen to One Mine, Incorporated, by and through its officers and employees, have excavated and driven an upraise from the main working shaft at a point a short distance below the 300-foot level through country rock for the purpose of connecting said shaft with said 300-foot level at a point some 50 or 60 feet northerly from said shaft. [97]

Affiant further discovered that on the 250-foot level, at a point about 300 feet northerly from the main working shaft of the Sixteen to One Mine, Incorporated, and within the limits and boundary lines

of the Belmont Lode Mining Claim, extended vertically downward (which said Belmont Lode Mining Claim belongs to and is owned by the Twenty-one Mining Company (a corporation), the defendant herein, and upon the same vein which the defendant herein is and has been, by said injunctive order, restrained from working and extracting ore therefrom (as shown by Exhibit "A" attached to the affidavit of Ed. Uren filed herein), the said plaintiff company, the Sixteen to One Mine, Incorporated, by and through its officers and employees, have within approximately the past thirty days excavated an irregular shaped winze or hold 25 feet deep and 40 to 50 feet long, upon the vein and that said plaintiff company has been and it is now engaged in stoping a large and valuable amount of very valuable gold ore commonly known as "high grade" from the side of said winze or hole. That said affiant saw two men engaged in working therein on said 12th day of November, 1916.

Affiant further alleges that in said 250-foot level at a distance of approximately 50 feet beyond said last-mentioned workings and northerly therefrom, the said plaintiff company by and through its officers and employees, has excavated an irregular shaped winze or hole, approximately 50 to 60 feet deep, and that it has been and is engaged in stoping very valuable gold ore commonly known as "high grade" from the side thereof.

That affiant has no means of knowing the total amount in value of the ore extracted from the said last two described workings on the 250-foot level,

but that owing to the richness of the ore which he saw in said workings he believes a very large amount in money value has been taken and extracted from said workings, and charges as a matter of information and belief that, to wit, the amount of Ten thousand dollars ($10,000) has been taken from said workings. [98]

That affiant has been informed by the officers and employees of said Sixteen to One Mine, Incorporated, at said mine that it is the intention of said plaintiff company to continue to mine and extract ore from the workings of said 250-foot level, and that it is also their intention to excavate and drive the tunnel from the 300-foot level to a point beneath said workings and upraise thereto and continue to mine and extract ore from said vein upon an even more extensive scale.

Affiant further says that the above-described workings on the 250-foot level where said plaintiff company has been mining and extracting ore are upon the same vein that defendant company is enjoined and restrained from working and is within the segment thereof covered by said injunctive order. That said vein is the property of the Twenty-one Mining Company and that said workings are within the limits and boundaries of the Belmont Lode Mining Company extended vertically downward, which said claim is the property of the defendant herein.

J. H. HUNT.

Subscribed and sworn to before me this 17th day of November, 1916.

[Seal] FLORA HALL,

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires April 14, 1917. [99]

The said plaintiff having theretofore obtained an order from the Judge of the above-entitled court shortening the time of the service of said motion to dissolve the preliminary injunction, which said order is in the words and figures following, to wit: [100]

[Title of Court and Cause.]

Order Shortening Time of Notice of Motion to Dissolve Preliminary Injunction.

Good cause appearing therefor, IT IS HEREBY ORDERED that the time for the giving of the Notice of the Motion to Dissolve the Preliminary Injunction rendered in the above-entitled action on the 22d day of August, 1916, be and the same is hereby shortened so that the same may be served on Friday, November 17th, 1916.

WM. C. VAN FLEET,

District Judge. [101]

That the hearing of said matter was postponed from the 20th day of November to the 21st day of November, 1916, at which time the Honorable William H. Hunt, sitting in the place and stead of the Honorable William C. Van Fleet, made the following order:

"Defendants motion to dissolve the preliminary injunction being partially heard, IT IS ORDERED

that the property is to be held in *statu quo* and no work is to be done until the further order of this Court and that the ore extracted by plaintiff be impounded. Ordered that the motion be continued for further hearing before Judge Van Fleet."

That thereafter on the 22d day of November, 1916, Hon. William C. Van Fleet ordered that the defendant's motion to dissolve the preliminary injunction be continued to November 27th, and in the meantime the property involved herein remain in *statu quo.*

That thereafter, on the 27th day of November, 1916, at the hour of 10 o'clock A. M. the said matter was heard by the Honorable William C. Van Fleet; the said plaintiff at that time presenting the affidavit of S. B. Connor in answer to defendant's motion to dissolve the preliminary injunction, which affidavit is in words and figures following, to wit: [102]

[Title Court and Cause.]

Affidavit of S. B. Connor, Filed by Plaintiff in Answer to Defendants' Motion to Dissolve Preliminary Injunction.

State of California,
City and County of San Francisco,—ss.

S. B. Connor, being first duly sworn according to law, deposes and says: That he is the vice-president of the original Sixteen to One Mine, Inc., plaintiff herein, and makes this affidavit in behalf of said plaintiff; that he has read the affidavit of J. H. Hunt filed in support of defendant's motion to dissolve Preliminary Injunction; that early in October, 1916, this plaintiff applied to this Honorable Court for an

order requiring defendant to furnish a bond indemnifying plaintiff against damage suffered by it as a result of refraining from mining on its own vein in the territory covered by the preliminary injunction directed against defendant, and affiant refers to and makes a part of this affidavit the affidavit made by affiant and filed in connection with said motion; that this plaintiff, after the issuance of said injunction, acting under advice of its counsel, had theretofore refrained from entering said territory covered by said injunction, but as evidenced by the affidavit of this affiant filed in support of said motion, this affiant was suffering material damage by reason of its refraining from mining as aforesaid and was not protected by any bond; that this Honorable Court on the 9th day of October, 1916, denied said motion, stating that the matter was not properly before the Court for determination; that thereafter, acting under advice of its counsel, plaintiff commenced to mine extralaterally [103] on the Sixteen to One vein on and in the vicinity of its two hundred fifty foot level, but a short distance from the vertical side line boundaries of its Sixteen to One claim, the place where plaintiff is at work being several hundred feet higher up on the inclination of the vein above the stope in which defendant was working when enjoined by this Court, and at a point remote from the mine workings of defendant;

That the main purpose of the resumption of mining by plaintiff in said territory immediately adjacent to its own vertical boundaries was to induce the defendant, if it was so disposed, to apply to this

Court for a counter-injunction, to prevent plaintiff from continuing mining operations, and as a condition of the granting of such counter-injunction, that it be directed to furnish a good and sufficient bond to adequately protect plaintiff from the damage suffered by it as a result of the consequent cessation of its mining operations;

That such mining as has been done by plaintiff as aforesaid has been done in good faith and under advice of counsel, and as a result of its desire to be adequately protected by a bond as aforesaid, and that an accurate account of the tonnage and value of all ore extracted has been and is being kept by plaintiff; that the total gross returns from the ore so extracted by plaintiff since the date when mining was resumed by plaintiff on or about October 11, 1916, is approximately seven thousand dollars ($7,000); that in the vicinity of the three hundred foot level and its main working shaft, said plaintiff has cut a pocket a few feet in extent into the country rock and away from the vein, and that this was done for the purpose of handling the ore to better advantage, and is in the line of ordinary mining operations and is such work as would universally [**104**] be done in mining in depth on a vein similarly situated, and that such work has not damaged defendant in any way;

That plaintiff for some time prior to the commencement of this action had been working and mining on its two hundred fifty level and vicinity in the orderly progress of its operations;

That before resuming mining operations on and in vicinity of said level, this plaintiff, on or about

October 10, 1916, caused defendant to be notified in writing of its intention "to proceed with the extraction of ore within their (Sixteen to One) extralateral planes," and further notified defendant that the object of such mining was to raise squarely the question as to whether or not plaintiff was entitled to the protection of a bond;

That plaintiff immediately thereafter resumed its mining operations and defendant had every opportunity to ascertain this fact, as plaintiff has at all times afforded defendant every opportunity of entering and examining its mine workings and operations, and defendant's representatives have repeatedly taken advantage of this opportunity and entered said workings, and its superintendent having been in every few days defendant was aware of such mining by plaintiff long prior to the 12th day of November, 1916;

That since the issuance of the preliminary injunction by this Court, this plaintiff has actively prosecuted work with the object of developing the facts with reference to the position of the apex of the Sixteen to One vein, with reference to the boundaries of the Sixteen to One claim, and that such development has further established the fact that the apex of the Sixteen to One vein exists within the Sixteen to One claim from the point [105] where it crosses the southerly end line of the Sixteen to One claim for a distance of approximately seven hundred fifty feet northwesterly, and in close proximity to the lode line of said claim, and that an upraise on the vein from the extreme end of the Sixteen to One Tunnel #2

has followed the Sixteen to One vein up, so that the top of the upraise is now close to the surface; establishing the apex of the Sixteen to One vein to be well within the boundaries of the claim, at a point approximately seven hundred fifty feet northwesterly from the southerly end line of the Sixteen to One claim, and near the lode line of said claim;

That defendant's theory that the Sixteen to One vein departs through the westerly side line of the Sixteen to One claim approximately five hundred feet northwesterly from the southerly end line of the Sixteen to One claim, as represented on Map Exhibit "A" attached to the Uren affidavit filed by defendant, has been disproved by the physical disclosures made on the vein itself, at or near the apex by these workings prosecuted by plaintiff since the issuance of the preliminary restraining order;

That Map Exhibit "B" attached to said Uren affidavit and filed by defendant in resisting plaintiff's application for a preliminary injunction, illustrates the contention there made by defendant that the Sixteen to One vein apexing within the Sixteen to One claim was not the same vein disclosed in the Twenty-one tunnel, and embracing the ore bodies in dispute on which defendant was mining when enjoined, but as indicated on said map, said vein disclosed in said Twenty-one tunnel on its inclination upward departed from the Sixteen to One incline shaft before said vein reached the 400-foot level in said shaft and turning abruptly at almost a right angle, thence extended at a very steep and almost vertical direction to the surface; [106]

That at that time there were no actual workings or vein exposures to establish this theory assumed by defendant, but that since said affidavit was filed, plaintiff has prosecuted work on the Sixteen to One vein so that now this vein is exposed and is demonstrated to actually exist continuously from the connection made with defendant's upraise from the Twenty-one tunnel at the bottom of the Sixteen to One incline shaft up to the four hundred foot level, and the Sixteen to One vein is shown to actually exist continuously through the intermediate territory which on said Uren Exhibit "B" is represented as not containing any downward extension of the Sixteen to One vein, but which shows that defendant's theory at the time involved a termination of the Sixteen to One vein in a downward direction at the four hundred foot level, and below the intervening break and cessation of the Sixteen to One vein there was a turning up of an entirely distinct vein found in the Twenty-one workings; and said Exhibit "B" led to the unavoidable inference that defendant claimed and represented that the vein found in the Sixteen to One workings at and above the Sixteen to One four hundred foot level had no connection whatsoever with the vein found in the Twenty-One workings below, whereas the actual exposure of the vein continuously through this intermediate territory by plaintiff's recent workings entirely disproves this earlier theory of defendant that the vein exposure above and below the said four hundred foot level constitute two separate and distinct veins, and this fact of vein identity is now admitted in the affidavit

of said J. H. Hunt above referred to, since he has alleged in that affidavit that the vein now being worked on [107] plaintiff's two hundred fifty foot level is the same vein that is exposed in defendant's Twenty-One tunnel and workings.

S. B. CONNOR.

Subscribed and sworn to before me this 21st day of November, 1916.

[Seal] LEWIS E. BURKE,

Notary Public in and for the City and County of San Francisco, State of California. [108]

That the affidavit referred to in the foregoing affidavit of S. B. Connor is in the words and figures following, to wit:

[Title of Court and Cause.]

Application and Affidavit in Support of Motion to Compel Defendant to Furnish Bond to Secure Plaintiff Against Damage.

State of California,

City and County of San Francisco,—ss.

S. B. Connor, being first duly sworn, deposes and says that he is the vice-president of the plaintiff in the above-entitled action and makes this affidavit on behalf of said plaintiff. That he refers to the Bill of Complaint and Answer in the above-entitled cause and the various affidavits and other documents heretofore filed herein and that it will appear therefrom that the plaintiff claims that there is a vein called the Sixteen to One vein, which apexes in the Sixteen to One claim for a distance of at least seven hundred and fifty feet (750) feet northerly of the

southerly end line of said claim, which end line is crossed by said apex. That said vein dips easterly and underneath surface ground claimed by defendant. That defendant had penetrated this vein by means of its Twenty-One tunnel and was engaged in working on this vein on its dip. That this plaintiff secured a restraining order from this Honorable Court and later on or about the 22d day of August, 1916, secured a Preliminary Injunction from this Honorable Court, which injunction ordered the defendant, its officers, etc., to cease working or mining, etc., on the vein in dispute between a vertical plane passed through the southerly end line of the Sixteen to One claim and another vertical plane situated parallel thereto and seven hundred and fifty (750) feet distant northwesterly therefrom. That one of the conditions of said Preliminary Injunction was that plaintiff should enter into a good and sufficient bond in [109] the sum of thirty thousand (30,000) dollars, which was duly furnished by plaintiff and approved by this Honorable Court and filed. That during the period of time that said Restraining Order was in force and at the argument made before this Honorable Court on the question as to whether a Preliminary Injunction should issue, said defendant, through its attorneys, urged that the plaintiff be not permitted to work this ore deposit in question between the planes described in said Restraining Order later adopted in said injunction. Immediately upon the issuance of said Restraining Order this plaintiff ceased work outside of the vertical boundaries of its Sixteen to One claim and

within said vertical planes except for the purpose of carrying on exploratory work necessary to develop its contention as to the physical conditions of said order deposit, and except for a limited period when it extracted a small amount of ore from beneath the surface of the Ophir claim, which claim is not owned by the defendant. That upon the issuance of the Preliminary Injunction, plaintiff, upon advice of its counsel, ceased work entirely within said vertical planes with the exception of carrying on litigation work as aforesaid, and that in the conduct of said litigation work it has kept an accurate record of any vein material necessarily extracted in the progress of these workings. That the said Sixteen to One vein dips from the Sixteen to One claim in an easterly direction and passes beyond the easterly side boundary at the Sixteen to One claim underneath adjoining claims and is the main vein of the Sixteen to One claim and that within the vertical boundaries of the Sixteen to One claim, there is very limited opportunity for discovering and developing ore within these vertical surface boundaries, but that the main opportunity for developing ore and keeping the mining plant of said company working properly is to pursue said vein extralaterally and within said planes prescribed in said Preliminary [110] Injunction. That defendant makes the contention that said Preliminary Injunction operates to prevent the plaintiff as well as the defendant from operating and mining within said ground while it is in force. That from purely euitable considerations this plaintiff under advice of its

counsel has heretofore refrained from mining in any part of said territory included between said planes mentioned in said injunction even including the territory lying vertically beneath the surface of the Ophir claim, to which surface said defendant asserts no claim of ownership. That for plaintiff to further refrain from conducting mining operations in said territory without being protected by a bond to be furnished by defendant which shall secure the plaintiff from all costs or damages that it may suffer by virtue of its failure to secure a continuous supply of ore, which it will not be able to do without entering the territory in question will result in great hardship and damage to plaintiff. That this defendant has existing on its Sixteen to One claim a plant of a total value of $25,000 dollars used for the purpose of extracting and treating ores which can not be economically operated without access to the ores in question. That it has several hundred feet of tunnels, incline, shaft and other workings which must be kept opened up and timbered. That it has an effective organization of reliable miners which it will have to either keep employed to a considerable financial disadvantage or will have to discharge and thus disrupt its organization. That said mining and milling plant will continue to depreciate at the average rate that such plants depreciate and that its capital investment indicated will be idle, not earning any income during the period of this litigation, and that plaintiff's loss and damage from these various causes will be as great as any loss or damage that might be suffered by defendant during the period

this litigation [111] may continue, and that therefore as a matter of equity it is equally important and just that the defendant in this action be required to furnish and file a bond in an amount equal to that already furnished by the plaintiff in this action, and protecting the plaintiff against any loss or damage which the plaintiff may suffer by reason of its refraining from extracting any of the ores lying in that segment of the ore bodies in dispute embraced within the vertical planes described in the said Preliminary Injunction.

WHEREFORE, this affiant in behalf of the plaintiff prays that this Honorable Court issue an order directed to the defendant and ordering it to furnish and file a bond in the sum of thirty thousand dollars ($30,000) with sureties to be approved by a Judge of the said court and conditioned upon the payment of such costs and damages as may be incurred or suffered by the plaintiff or by any party who may be found to have been wrongfully injured by reason of said plaintiff's refraining from mining ores in the disputed territory and consequent inability to operate its plant as hereinbefore more fully set forth, pending this litigation, and plaintiff prays for such further relief as to this Court may seem meet and equitable.

S. B. CONNOR,

As Vice-President of and in Behalf of the Plaintiff.

Subscribed and sworn to before me this 3d day of October, 1916.

EUGENE W. LEVY,
Notary Public in and for the City and County of San Francisco, State of California.

WM. E. COLBY,
GRANT H. SMITH,
Attorneys for Plaintiff. [112]

That no other evidence was offered by either party upon the hearing of said motion. That said motion was thereupon argued by counsel for defendant and by counsel for the plaintiff and by the Court was taken under submission.

That thereafter, on the 15th day of December, 1916, the Court made its order refusing to dissolve the preliminary injunction theretofore granted to plaintiff in the said action and ordering that said motion be denied but that a cross-injunction might be had restraining the plaintiff pending the suit, from further prosecuting mining operations on the disputed vein upon defendant giving a bond in the sum of thirty thousand dollars ($30,000), which said order is in words and figures following, to wit: [113]

At a stated term of the Southern Division of the District Court of the United States of America for the Northern District of California, Second Division, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 15th day of December, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 292—EQUITY.

ORIGINAL SIXTEEN TO ONE MINE, INC.

vs.

TWENTY-ONE MINING CO.

Order Denying Motion to Dissolve Preliminary Injunction, etc.

Defendant's motion to dissolve the preliminary injunction heretofore granted plaintiff, having been submitted and being now fully considered and the Court having filed its memorandum opinion, it is ordered that said motion be denied but a cross-injunction may be had restraining the plaintiff pending the suit from further prosecuting mining operations on the disputed vein upon defendant giving a bond in the sum of $30,000 to indemnify plaintiff against any damages suffered by plaintiff for such restraint. **[114]**

That defendant now excepts to the said order and presents the foregoing as his Bill of Exceptions in said proceeding and prays that the same may be set-

tled and allowed and signed and certified by the Judge as provided by law.

WM. H. METSON,
FRANK R. WEHE,
BRUCE GLIDDEN,
Attorneys for Defendant.

Dated December 16th, 1916.

The foregoing Bill of Exceptions is correct and the same may be settled and allowed.

WM. E. COLBY,
GRANT H. SMITH,
Attorneys for Plaintiff.

December 22d, 1916.

The foregoing Bill of Exceptions is hereby approved, settled and allowed.

WM. C. VAN FLEET,
Judge.

December 23d, 1916.

[Endorsed]: Filed Dec. 23, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [115]

[Title of Court and Cause.]

Stipulation and Order Re Exhibits "A" and "B" Attached to Affidavit of Ed Uren, etc.

IT IS HEREBY STIPULATED by and between the attorneys for the respective parties to the above-entitled suit that the Exhibits "A" and "B" attached to the affidavit of Ed Uren filed by the defendant upon the application of plaintiff for a preliminary injunction in said suit, may be deemed to be and treated as a part of the defendant's Bill of

Exceptions on appeal from the order refusing to dissolve the preliminary injunction in said suit, the same as though the said Exhibits "A" and "B' had been fully set forth and incorporated in said Bill of Exceptions.

WM. E. COLBY,
GRANT H. SMITH,
Attorneys for Plaintiff.
W. H. METSON,
FRANK R. WEHE,
BRUCE GLIDDEN,
Attorneys for Respondent.

It is so ordered.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Dec. 23, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [116]

[Title of Court and Cause.]

Petition for Appeal from Order Denying Motion to Dissolve Preliminary Injunction, etc.

The above-named defendant, Twenty-one Mining Company, considering itself aggrieved by the order and decree made and entered by the above-named court in the above-entitled cause, under date of December 15, 1916, wherein and whereby the above-entitled court denied the motion of defendant to dissolve the preliminary injunction theretofore made and entered in said cause on the 22d day of August, 1916, and ordering further that a "cross-injunction might be had by the defendant restraining the plain-

tiff, pending the suit, from further prosecuting mining operations on the disputed vein, upon defendant giving a bond in the sum of thirty thousand dollars ($30,000) to indemnify the plaintiff against damages suffered by plaintiff for such restraint," does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from said order for the reasons set forth in the assignment of errors which is filed herewith; and prays that this petition for its said appeal may be allowed and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

W. H. METSON,
FRANK R. WEHE,
BRUCE GLIDDEN,
Attorneys for Defendant, Petitioner.

[Endorsed]: Filed Dec. 22, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [117]

[Title of Court and Cause.]

Assignment of Errors.

Comes now the above-named defendant, Twenty-one Mining Company, and files the following assignment of errors upon which it will rely on its appeal from the order made by the above-entitled court in the above-entitled cause on the 15th day of December, 1916, refusing to dissolve the preliminary injunction theretofore issued in said cause, and ordering that the defendant may have a cross-injunction restrain-

ing the plaintiff, pending the suit, from further prosecuting mining operations on the disputed vein, conditioned upon its filing bond in the sum of thirty thousand dollars ($30,000) to indemnify plaintiff against any damages suffered by plaintiff for such restraint. [118]

I.

The Court erred in refusing to dissolve the preliminary injunction *pendente lite* for the reason that the preliminary injunction was issued to maintain the *status quo pendente lite* and to this end was equally binding upon the defendant and the plaintiff.

II.

The Court erred in denying the motion to dissolve as the evidence offered on the hearing of the motion showed that the plaintiff was actually working in the segment of the vein in which the defendant was enjoined from working and which was the vein in dispute.

III.

The Court erred in denying defendant's motion to dissolve the preliminary injunction heretofore entered in this suit at the instance of complainant, for the reason that it appeared from the evidence submitted upon said motion that the complainant was actually working within the segment of the vein and beneath the surface lines of the defendant, being the same area in which defendant was enjoined from working. By its refusal to dissolve said injunction, therefore, the said District Court has given the complainant by two steps, an injunction which enjoined defendant out of and complainant into possession,

tied the hands of defendant with reference to working its own property and at the same time granted the complainant the right to work out the ore within the enjoined area. The result of which order will be that at the termination of this litigation irremediable damage will have been committed, and the subject matter of the suit pending the litigation been destroyed by reason of this violation of the *status quo* by complainant.

IV.

The Court erred in ordering that the defendant might have a cross-injunction restraining the plaintiff *pendente lite* from prosecuting mining in the disputed vein, conditioned upon its giving a bond in the sum of thirty thousand dollars ($30,000) to indemnify the plaintiff for any damages it might suffer by such restraint. **[119]**

V.

The Court erred in not ordering the plaintiff to maintain the *status quo* as a condition to a denial of the motion to dissolve, as it appeared to the Court that plaintiff of its own motion had enjoined the defendant out of possession of the property in dispute, and therefore if the injunction was sustained the plaintiff should not be left in a position to violate it.

WHEREFORE, this defendant prays that the said interlocutory order of said Court may be reversed and that said District Court for the Northern District of California, Second Division, may be ordered to enter a decree dissolving the said preliminary injunction in accordance with the prayer of the motion of defendant in that behalf, and that the

defendant have such other relief as it is entitled to in accordance with law.

W. H. METSON,
FRANK R. WEHE,
BRUCE GLIDDEN,
Attorneys for Defendant.

[Endorsed]: Filed Dec. 22, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [120]

[Title of Court and Cause.]

Order Allowing Appeal.

Upon motion of W. H. Metson, one of the attorneys for the defendant, and on filing the petition of the Twenty-one Mining Company, together with an assignment of errors,—

IT IS ORDERED that an appeal be and is hereby allowed to the United States Circuit Court of Appeals for the Ninth Circuit from the interlocutory order entered December 15, 1916, refusing to dissolve the preliminary injunction theretofore entered in said cause by this Court, but ordering that defendant might have a cross-injunction restraining the plaintiff pending the suit from further prosecuting mining operations on the disputed vein, upon giving a bond in the sum of thirty thousand dollars ($30,000) to indemnify the plaintiff against damages suffered by the plaintiff for such restraint; that the amount of the bond upon said appeal be and hereby is fixed at the sum of three hundred dollars, and that a certified transcript of the record and proceedings herein

be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

WM. C. VAN FLEET,
District Judge.

[Endorsed]: Filed Dec. 22, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [121]

32501–16.

UNITED STATES FIDELITY AND GUARANTY COMPANY.

Capital Paid in Cash $2,000,000.
Total Resources Over $6,000,000.

Home Office:
BALTIMORE, MD.

In the District Court of the United States, Northern District of California, Second Division.

ORIGINAL SIXTEEN TO ONE MINE, INC., a Corporation,

Plaintiff,

vs.

TWENTY–ONE MINING CO., a Corporation,

Defendant.

Bond on Appeal from Order Denying Motion to Dissolve Injunction.

Whereas, in an action in the District Court of the United States, Northern District of California, Second Division, an Order was on the 15th day of December, 1916, made, entered and filed in favor of the plaintiff and against the defendant, refusing to dissolve a preliminary injunction, etc.; and

Whereas, the said defendant is dissatisfied with the said Order, and is desirous of appealing therefrom to the United States Circuit Court of Appeal for the Ninth Circuit of the Northern District of the State of California;

NOW, THEREFORE, in consideration of the premises and of such appeal the United States Fidelity & Guaranty Company, a corporation, having its principal place of business in the City of Baltimore, State of Maryland, and having a paid up capital of two million dollars, duly incorporated under the laws of the State of Maryland for the purpose of making, guaranteeing and becoming surety on bonds and undertakings, and having complied with all the requirements of the laws of the State of California respecting [122] such corporations, does hereby undertake in the sum of three hundred dollars, and promise on the part of the appellant that said appellant will pay all damages and costs which may be awarded against it, on said appeal, or on a dismissal thereof, not exceeding the aforesaid sum of three hundred dollars, to which amount it acknowledges itself bound.

Dated at San Francisco, this 22d day of December, A. D. 1916.

UNITED STATES FIDELITY & GUARANTY COMPANY.

[Corporate Seal] By H. V. D. JOHNS,
By B. F. CATOR,
Attorneys in Fact.

Approved:
WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Dec. 23, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [123]

[Title of Court and Cause.]

Stipulation as to What Shall Constitute Record on Appeal.

IT IS HEREBY STIPULATED between the plaintiff and the defendant, by and through their respective attorneys, that the transcript of record on appeal from the order denying the motion to dissolve the preliminary injunction, etc., shall be made up of the following papers, to wit:

Bill of Complaint;

Affidavit of Fred Searles;

Application for Restraining Order and Order of Inspection;

Affidavit of George O. Scarfe;

Answer to Bill of Complaint;

Affidavit of J. H. Hunt, dated August 10, 1916;

Affidavit of J. H. Hunt, dated August 14, 1916;

Affidavit of Ed. Uren, dated August 8, 1916;

Counter-affidavit of S. B. Connor, dated August 14, 1916;

Counter-affidavit of Andrew C. Lawson, dated August 15, 1916;

Counter-affidavit of S. B. Connor, dated August 16, 1916;

Counter-affidavit of William A. Simpkins, dated August 16, 1916; [124]

Notice of Motion to compel defendant to furnish bond pending litigation;

Order of Court on said motion;

Bill of Exceptions;

Stipulation of counsel as to Bill of Exceptions;

Stipulation of counsel as to what shall constitute record;

Stipulation of counsel as to Printing Record;

Stipulation of counsel as to Original Maps;

Petition for Allowance of Appeal;

Assignment of Errors;

Order Allowing Appeal;

Bond on Appeal;

Citation on Appeal;

Praecipe for the Transcript.

WM. E. COLBY,
GRANT H. SMITH,
Attorneys for Plaintiff.
FRANK R. WEHE,
W. H. METSON,
BRUCE GLIDDEN,
Attorneys for Defendant.

Dated December 28, 1916.

So ordered:

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Dec. 29, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[125]**

[Title of Court and Cause.]

Stipulation Re Printing of Record.

IT IS HEREBY STIPULATED AND AGREED that in the printing of the record herein for the consideration of the Court on appeal from the order

denying the motion of defendant to dissolve the preliminary injunction, etc., heretofore entered in the above-entitled cause, the title of the court and cause in full on all of the pages shall be omitted except on the first page and inserted in lieu thereof "Title of Court and Cause."

Dated San Francisco, Decemer 28, 1916.

WM. E. COLBY,
GRANT H. SMITH,
Attorneys for Plaintiff.
FRANK R. WEHE,
W. H. METSON,
BRUCE GLIDDEN,
Attorneys for Defendant.

So ordered:

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Dec. 29, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[126]**

[Title of Court and Cause.]

Stipulation In Re Original Exhibits.

IT IS HEREBY STIPULATED by and between the attorneys for the respective parties to the above-entitled suit that all of the original exhibits, being maps either attached to or by reference made a part of the affidavits of Fred Searls, George O. Scarfe and Ed Uren, heretofore filed on the motions for a restraining order or a preliminary injunction in the above-entitled suit, may be transmitted to the Circuit Court of Appeals and be deemed and considered a

part of the record on appeal from the order of the Court denying the motion to dissolve the preliminary injunction, etc., the same as though they were incorporated in said record.

Dated San Francisco, Dec. 28, 1916.

WM. E. COLBY,
GRANT H. SMITH,
Attorneys for Plaintiff.
FRANK R. WEHE,
W. H. METSON,
BRUCE GLIDDEN,
Attorneys for Defendant.

So ordered:

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Dec. 29, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [127]

[Title of Court and Cause.]

Praecipe for Record on Appeal.

To the Clerk of the Above-entitled Court:

You are hereby directed to make and prepare the record on appeal in the above-entitled cause from the order heretofore made and entered on December 15, 1916, denying the motion of defendant to dissolve the preliminary injunction heretofore issued in said cause, etc., and have the same in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, the 21st day of January, 1917. In preparing said transcript it shall be made up of the following papers, to wit:

Bill of Complaint;

Affidavit of Fred Searles;

Application for Restraining Order and Order of Inspection;

Affidavit of George O. Scarfe;

Answer to Bill of Complaint;

Affidavit of J. H. Hunt, Dated August 10, 1916;

Affidavit of J. H. Hunt, Dated August 14, 1916;

Affidavit of Ed. Uren, Dated August 8, 1916;

Counter-Affidavit of S. B. Connor, Dated August 14, 1916; [128]

Counter-Affidavit of Andrew C. Lawson, Dated August 15, 1916;

Counter-Affidavit of S. B. Connor, Dated August 16, 1916;

Counter-Affidavit of William A. Simpkins, Dated August 16, 1916;

Notice of Motion to Compel Defendant to Furnish Bond Pending Litigation;

Order of Court on Said Motion;

Bill of Exceptions;

Stipulation of Counsel as to Bill of Exceptions;

Stipulation of Counsel as to What Shall Constitute Record;

Stipulation of Counsel as to Printing Record;

Stipulation of Counsel as to Original Maps;

Petition for Allowance of Appeal;

Assignment of Errors;

Order Allowing Appeal;

Bond on Appeal;

Citation on Appeal;
Praecipe for the Transcript.

FRANK R. WEHE,
W. H. METSON,
BRUCE GLIDDEN,
Attorneys for Defendant.

[Endorsed]: Filed Dec. 29, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [129]

[Title of Court and Cause.]

Clerk's Certificate to Record on Appeal.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing one hundred twenty-nine (129) pages, numbered from 1 to 129, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for transcript of record, as the same remain on file and of record in the above-entitled cause, and that the same constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $74.90; that said amount was paid by defendant; and that the original citation issued herein is hereunto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 3d day of January, A. D. 1917.

[Seal] WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk. [130]

[Title of Court and Cause.]

Citation on Appeal.

United States of America,
Northern District of California,
Second Division.

The President of the United States of America, to Original Sixteen to One Mine, Inc. (a Corporation), Plaintiff:

You are hereby cited and admonished to appear and be at the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to an order allowing an appeal made and entered in the above-entitled cause, in which the original Sixteen to One Mine, Inc. (a Corporation), is plaintiff and respondent, and Twenty-One Mining Company, (a Corporation), is defendant and appellant in said appeal to show cause if any there be, why the interlocutory order made and entered in said cause on the 15 day of December, 1916, refusing to dissolve the preliminary injunction theretofore entered in said suit, and ordering that the defendant may have a cross-injunction restraining the plaintiff, pending the suit, from further prosecuting mining operations on the disputed vein, conditioned upon its giving a bond in the sum of Thirty Thousand Dollars ($30,000) to indemnify plaintiff against any damages suffered by plaintiff, should not be set aside, corrected and reversed and why speedy justice should [131] not be done to the defendant, Twenty-one Mining Company, a corporation.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 22d day of December, one thousand nine hundred and sixteen.

WM. C. VAN FLEET,
District Judge for the Northern District of California, Second Division.

Service of a copy of the within and foregoing citation admitted this 22d day of December, 1916, at the City and County of San Francisco, State of California.

WM. E. COLBY,
GRANT H. SMITH,
Attorneys for Plaintiff and Respondent.

[Endorsed]: No. 292—In Equity. In the District Court of the United States Northern District of California, Second Division. Original Sixteen to One Mine, Inc., Plaintiff, vs. Twenty-one Mining Company, Defendant. Citation on Appeal. Filed Dec. 23, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [132]

[Endorsed]: No. 2909. United States Circuit Court of Appeals for the Ninth Circuit. Twenty-One Mining Company, a Corporation, Appellant, vs. Original Sixteen to One Mine, Inc., a Corporation, Appellee. Transcript of the Record. Upon Appeal

from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filed January 3, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

No. 2909.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

TWENTY-ONE MINING COMPANY, a Corporation,
Appellant,

vs.

ORIGINAL SIXTEEN TO ONE MINE, Inc., a Corporation,
Appellee.

BRIEF FOR APPELLANT.

W. H. METSON,
FRANK R. WEHE,
BRUCE GLIDDEN,
Attorneys for Appellant.

METSON, DREW & MACKENZIE and
E. H. RYAN,
Of Counsel.

Filed this.....day of January, A. D. 1917.
FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

The James H. Barry Co.
San Francisco

No. 2909.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

TWENTY-ONE MINING COMPANY, a Corporation,

Appellant,

vs.

ORIGINAL SIXTEEN TO ONE MINE, Inc., a Corporation,

Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from an order denying defendant's (appellant's) motion to dissolve a *pendente lite* injunction.

This litigation arises between conflicting lode claimants and involves common law, apex and extra-lateral rights.

Appellee filed a complaint at law which alleged ownership of a lode; that this lead apexed in plain-

tiff's location; that on its dip into the earth it departed through the side lines of appellee's (complainant's) location and beneath and under the surface of the location claimed by appellant (defendant below), and that defendant had wrongfully mined ores from plaintiff's said vein to appellee's (complainant below) damage.

Ancillary to this law complaint, appellee, filed a bill in equity (Tr., 1), reasserting all of the allegations of the complaint and further that defendant below (appellant here) was continuing and threatened to continue to stope from the designated area and praying for an injunction.

After answer filed (Tr., 32) and a hearing an injunction *pendente lite* (Tr., 91) was issued restraining defendant (appellant here) from mining within the disputed sector.

After the granting of this injunction complainant (appellee here) began mining within this same vein *under* defendant's surface, and *within* the enjoined sector and thereafter complainant admittedly extracted ore of a value of $7,000.00 and upward, and continues that waste.

Defendant moved the court below to dissolve the injunction because of this admitted violation by complainant below of its own injunction and the *status quo* (Tr., 94).

The court below denied the motion to dissolve and ratified this violation unless defendant should file a

bond in the sum of $30,000.00 running to the complainant (Tr., 112).

Defendant has not asked for a cross injunction.

There has been no trial.

Defendant below brings its appeal to this Court.

ASSIGNMENT OF ERRORS.

I.

The Court erred in refusing to dissolve the preliminary injunction *pendente lite* for the reason that the preliminary injunction was issued to maintain the *status quo pendente lite* and to this end was equally binding upon the defendant and the plaintiff.

II.

The Court erred in denying the motion to dissolve as the evidence offered on the hearing of the motion showed that the plaintiff was actually working in the segment of the vein in which the defendant was enjoined from working and which was the vein in dispute.

III.

The Court erred in denying defendant's motion to dissolve the preliminary injunction heretofore entered in this suit at the instance of complainant, for the reason that it appeared from the evidence submitted upon said motion that the complainant was actually

working within the segment of the vein and beneath the surface lines of the defendant, being the same area in which defendant was enjoined from working. By its refusal to dissolve said injunction, therefore, the said District Court has given the complainant by two steps, an injunction which enjoined defendant out of and complainant into possession, tied the hands of defendant with reference to working its own property and at the same time granted the complainant the right to work out the ore within the enjoined area. The result of which order will be that at the termination of this litigation irremediable damage will have been committed, and the subject-matter of the suit pending the litigation been destroyed by reason of this violation of the *status quo* by complainant.

IV.

The Court erred in ordering that the defendant might have a cross-injunction restraining the plaintiff *pendente lite* from prosecuting mining in the disputed vein, conditioned upon its giving a bond in the sum of thirty thousand dollars ($30,000) to indemnify the plaintiff for any damages it might suffer by such restraint.

V.

The Court erred in not ordering the plaintiff to maintain the *status quo* as a condition to a denial of

the motion to dissolve, as it appeared to the Court that plaintiff of its own motion had enjoined the defendant out of possession of the property in dispute and therefore if the injunction was sustained the plaintiff should not be left in a position to violate it.

ARGUMENT.

It is fundamental interlocutory injunction law:

(a) That an injunction *pendente lite* can have no function but to maintain the *status quo* until final determination;

(b) That complainant is as strongly bound by his own injunction as is the defendant.

(c) That a defendant cannot *pendente lite* be enjoined out of possession;

Through the injunction granted against defendant by the lower Court, the abuse of that process by the complainant, and the denial of defendant's motion to dissolve that injunction by reason of complainant's said violation, all of the above principles have been set at naught in the suit at bar.

The trial Court by sanctioning the complainant's continued stoping of the pay from the ledge in litigation, and in the enjoined sector and beneath our surface, unless defendant bond to complainant, has exceeded its jurisdiction, and *ex parte* made an in-

junction a writ of execution depriving defendant of its day in court and its right to a trial by jury.

An interlocutory injunction is self-acting against the complainant forthwith it is granted. It is active to maintain the "existing state of things" against the defendant, his agents and all others immediately service is made or knowledge thereof exists in them.

Complainant cannot enjoin defendant out of possession nor complainant into possession.

Injunction does not lie against defendant *pendente lite* not to interfere with complainant in performing certain acts changing the "existing state of things" because that would be equivalent to enjoining defendant out and plaintiff in.

Inasmuch as no part equals the whole there can be no qualification attached to an injunction thereby breaking it into pieces or successive steps.

The complainant cannot be enabled to possess indirectly that to which he is not directly entitled.

An injunction is self-acting against the complainant because of his activity in obtaining it and because an injunction binds all who have knowledge. The complainant from the inception has all knowledge. It is self-acting in its entirety against the complainant, otherwise the qualification might attach that complainant was only bound to respect his own injunction in the *event* that the defendant did not furnish a bond running to the complainant. The defendant consents or may be passive on the application for

the injunction; but usually strongly resists its being granted.

The defendant need not ask an injunction against complainant because the latter is bound by the rule of equity which prevents complainant from acting contrary to the injunction order.

The defendant must obey and so must complainant and everyone else.

The defendant has a right to rely upon the rule that complainant cannot violate his own process. The injunction binds all, everyone, and the defendant is as much protected by it against any act of the complainant as are all who have knowledge of its issuance bound to obey it.

The conduct of the affairs of life are, to some extent, more or less discretionary with those who participate therein. However, when a party comes into a court and becomes an actor and invokes its process he becomes at once bound by all the rules of law and equity; the procedure invoked controls all parties to the litigation. He having invoked the court's process cannot proceed along different avenues to suit his discretion. The Court's discretion supersedes all other.

As Pomeroy epitomizes it, complainant can have no equitable relief unless he acknowledges, concedes, admits and provides for all the equitable rights, claims and demands of his adversary.

The complainant has no bludgeon with which to

attack his unarmed opponent. He must proceed within the rule. So in the case at bar, the rule of equity is absolute that no one can violate his own injunction. The rule binds the complainant whether the defendant consent to the injunction, is passive thereto or resisted the same.

In fact it is the settled rule that when a defendant is brought into a Court of Equity an equitable right may be secured to defendant which that Court in conformity with its uniform methods would not and even could not have secured or awarded to him in a suit where defendant was plaintiff.

Any self-construed privilege as to working in defendant's ground that complainant might have taken advantage of before instituting legal proceedings, was automatically ended by the injunction. It restrained complainant as well as defendant. That is the rule; has been the rule of equity beyond memory and is not lightly to be set aside. The complainant cannot invoke the process of the Court and then abuse that process. Injunction is process and process only. When process issues it is not to be trifled with, varied or changed. It cannot be qualified by complainant, made use of at his pleasure, or disposed of according to his whim.

The Court cannot sanction any violation of its terms by complainant. It has been made a rule absolute to "preserve an existing state of things." The rule never has been qualified to mean—to preserve *against* the defendant but complainant may destroy—that de-

fendant shall not use the property but that complainant may enjoy its substance and return but a shadow.

The Court should not have read into the original process any terms—no "ifs," "may" or "in the event," as has been done here.

Suppose the defendant owner of a mine left a number of miners at work extracting ore from his mine and went abroad before litigation was contemplated. Complainant, asserting ownership of the vein being worked by defendant's men, obtains an injunction in defendant's absence and stopped these men from working. These poor employees would know nothing of how nor have any authority to protect the defendant in court.

Suppose the injunction order provided that complainant might work the disputed vein unless defendant forthwith furnished a bond running to complainant in the sum of $30,000. The defendant without any notice whatsoever would be deprived of his property rights without a day in court as he had no notice whatsoever of the injunction order and could be given none.

Suppose again that the defendant had no means and no credit with which to give the bond in the sum of $30,000, and upon being given notice of the injunction was unable to supply the designated bond?

Manifestly the defendant in possession of his own property could be enjoined out of the same and the complainant permitted to extract all the values therein

simply because of complainant's financial strength, although the defendant may have had by the assertion of his common law rights every ability to protect his property, which privilege, were he present, is guaranteed to him under the Constitution, were it not for the injunction order of the Court.

Suppose the ancillary bill here had been for a receiver and a receiver had been appointed to take charge of the disputed property, would the Court look with favor upon mining the pay shoot by either the complainant or defendant? If complainant did stope he would be no more a violator than here.

Defendant is in the physical possession of a mining location.

The Circuit Court of Appeals for this Circuit has adopted what was said by Judge Hawley, that "The "owner of the mine is right in saying: hands off any "and everything within my surface lines extending "vertically downward, until you prove that you are "working upon and following a vein which has its "apex within your surface claims of which you are "the owner."

Prima facie then this defendant has title.

He has the right to protect his property, using all force that is necessary so to do.

That is the organic law of this country, and beyond that, it is a natural right.

The same fundamental law guarantees the possession and title of this defendant to this same property

and to every part of it until his claimed title be adjudged invalid after a trial in court and a verdict of a jury.

There can be no new procedure or practice that will hamper or limit that constitutional right. No proceedings can be initiated or crystallized by legislatures or by courts that can in advance of that final judgment, determine that title.

It must be obvious that no ingenuity of counsel, no pretense of following pretended forms of law can carve out one atom of that right. No sophistry, no court burdens may take that title from the defendant, short of the judgment provided by the constitution.

It takes revolutions to overthrow constitutions and it is revolutionary to attempt to circumscribe or weaken defendant's title contrary to the foundation law.

The primary proposition of injunction *pendente lite* has been violated in this proceeding.

The very idea of an injunction is to prevent waste and irreparable injury.

If the damage is not irremediable an injunction will not issue.

Its intent is to preserve the *status quo;* to prevent destruction of the substance of the litigation.

May the Court sanction the plea of complainant that the defendant is committing an injury that de-

stroys the *subject* of the suit, and then the complainant having tied defendant's hands upon that kind of a prayer, be permitted to go into the enjoined territory and perform the very act of destruction enjoined by removing the *corpus* of the suit itself, so that at the end of the litigation there is nothing as to which a court determination can be obtained?

"Judgment" has been arrived at by injunction and by complainant helping itself to the ore in litigation and appropriating the same to its own use.

The unquestioned law is that the owner of the surface has title beneath all the same to the center of the earth.

It has never been refuted that the owner of land shall have his day in court and that his title shall never be overthrown therein, except upon a trial, and if demanded, before a jury of his peers.

Equity has no jurisdiction to try title to land.

It is only those who have a clear legal title to land, *as well* as its actual possession, who have the right to claim the aid of a Court of Equity to even quiet title.

It is unheard of that a bill in equity, ancillary to an action at law, may be a foundation for the destruction of a defendant's title assailed in the only proper and legitimate way, i. e., by an action at law.

It has until this proceeding been unthought of, that something ancillary and helpful to a basic action may become the full power whereby that which is attacka-

ble in but the above suggested one lawful way, may be made waste of and destroyed by the incident.

An ancillary bill in a suit in equity can never be given vigor enough to destroy the defendant's title, and while the action at law upon which the equity suit is based is still untried, oust the defendant and crown the complainant with all a victor's laurels.

There is no such jurisdiction in the Federal District Court.

This is *statutory* and jurisdictional. The bill herein is ancillary to the action at law. It was filed for the purpose of aiding the action at law. It can have no other object than to preserve the subject-matter of "the action" pending the litigation. If more is claimed then the trial Court has no jurisdiction beyond that object. When process issued under the ancillary bill, it said "refrain from destruction, maintain the *statu quo.*" That was express and it bound all the world-actors, aiders, agents, employees—all. It was as it were, *in rem,* i. e., as to the status of the property, the subject of the litigation. So far jurisdiction existed to preserve—not for complainant but to preserve the property—to maintain a *statu quo.* Ancillary bills give jurisdiction to aid, no more, nor less.

How far afield has gone the proceeding now at bar.

With the action at law still untried, upon a simple motion the complainant deprives the defendant of his common law rights of title and steps into the vein

within the enjoined territory beneath the defendant's surface and removes the ore, the subject-matter of the action, while the defendant helplessly looks on.

Equity this?

Under what definition of equity may the defendant thus be chained, and while in that condition the subject-matter of the action and of the suit extracted from within the walls of the country rock, the eyes picked out of the mine?

When the trial comes on there is nothing that is not MOOT for the Court to determine.

The defendant has the empty shell and the complainant has the yellow gold contents—the proceeds of the very subject-matter of the litigation.

All this result, not under the Constitution which says that every man is entitled to have his day in court before a jury. Defendant has had not that, nor even yet the determination of the issues tendered under an ancillary bill, which by every definition can only aid in the action at law to the extent that it may bring about and maintain a *statu quo* pending the determination of the issues involved in the action at law. Defendant's property has been confiscated upon a mere motion deciding a minor issue presented under the ancillary bill.

Upon no ultimate allegation but upon one incidental element only the defendant is despoiled from ever working what *prima facie* is its own. It is obliged to stand quietly and see the complainant, with

the sanction of the lower Court, absorb that which the complainant insists as against the defendant can only be done by the commission of irreparable injury.

If *status quo* means holding as is; if injunction means holding in *statu quo,* and prevention of destruction of the subject-matter of litigation, is the destruction by complainant different legally than destruction by the defendant?

In support of its decision, the Court below cites in its opinion but two cases, namely, *Maloney* v. *King* (Mont.), 76 Pac., p. 940, and *Johnson* v. *Hall* (Ga.), 9th S. E., 783.

We earnestly suggest there is no applicability of the facts in the case of *Maloney* v. *King* to those in the case at bar.

That decision was made by the Supreme Court of Montana May 23, 1904.

The litigation involved dip rights. Plaintiff filed suit for damages for trespass beneath its surface and for an injunction and to quiet title. The defendants answered denying trespass and set up ownership in the vein and dip rights beneath plaintiff's claims and asked that defendants' title be quieted.

An interlocutory injunction was issued against defendants "from entering and trespassing upon . . . " or digging . . . underneath . . . the plaintiff's

"claim . . . and from extracting . . . and in-
"terfering . . . within surface lines extended ver-
"tically downward."

Plaintiffs' injunction was affirmed on appeal.

Defendants, soon after plaintiffs' injunction was granted, instituted a new suit against plaintiffs, alleging trespass on the same vein and asked for an injunction and this injunction was denied. Said defendants as plaintiffs dismissed that case and commenced a new suit against the original plaintiffs and again applied for a temporary injunction and this suit was dismissed. The Supreme Court of Montana then said as follows:

> "The practice pursued by defendants in this regard cannot be countenanced or approved of by this Court, for at least two reasons:
>
> "1. The object of defendants sought to be accomplished by these two suits was undoubtedly to obtain a reciprocal or mutual injunction. They, being enjoined from working the disputed ground, desired that the plaintiffs should also be enjoined, so that the premises should remain in *statu quo* pending the litigation. However desirable such result would seem to be, it could have been attained in the original suit by petition on part of defendants setting forth the facts and the reasons for such relief. Upon a hearing, if the Court concluded that a proper showing had been made, it would undoubtedly have granted the relief sought. The policy of the law is to prevent useless litigation, and, whenever a proceeding is instituted broad enough in its character to include the hearing and determination of all existing issues

between the parties touching the same subject-matter, such issues should all be presented for determination in that suit, and neither the Court nor the parties be vexed with separate suits."

It appeared further that the original defendant after the above mentioned proceedings began various other suits as plaintiffs against the plaintiff in the original suit, whereupon the plaintiffs in the original suit asked that the preliminary injunction in the original suit be enlarged to restrain defendants in the original suit from bringing any actions, etc., and the Court extended the injunction. From this enlarged injunction order the defendants in the original suit appealed. The Supreme Court then say:

"To hold that the defendants could not mine any ore in the disputed territory, could not take away or convert to their own use any of the ores, rocks, or minerals therein, could not interfere with any portion of the premises, or any part thereof, or any of the rocks, ores, or minerals therein, but that they might recover the same, or the value thereof, after plaintiffs had extracted them, while a suit was pending the purpose of which was to determine the rights of the parties to the veins from which the ore was extracted, would be, at least, anomalous. The legal effect of the original injunction being the same before as after amendment, and this Court having affirmed the granting thereof, no error could be predicated upon the order appealed from.

"We therefore advise that the order appealed from be affirmed."

Thus it will be seen that the case of *Maloney* v. *King* was simply an appeal by defendants from an order extending the terms of an injunction *pendente lite* against the defendants in the first suit filed. Its original injunction suit was followed by the defendants in that case instituting trespass suits for the recovery of certain ores extracted and others for the value of certain converted ores from the same vein in controversy to the number of nine. Whereupon the original plaintiff asked that the original preliminary injunction be enlarged to restrain defendants from bringing such actions.

Then the original defendant appealed from the order extending the original injunction restraining defendants from becoming plaintiffs in other suits respecting the same property. Therefore the only matter before the Court on appeal was the enlargement of the original injunction order.

The Supreme Court of Montana sustained the lower Court.

This decision of the Supreme Court of Montana in *Maloney* v. *King* is characterized in *Lindley on Mines* at Sec. 872, page 2193, 3rd edition, as follows:

> "The Supreme Court of Montana has held in a confused case that the defendant's failure to move for a cross injunction when the complainant's injunction was granted, prevents him from subsequently obtaining relief. This ruling seems unfortunate. The defendant ought not to be re-

quired to anticipate the complainant's violation of the spirit of his own injunction and his abuse of the Court's process."

We cannot see that the Supreme Court of Montana meant any infringement of the general rule that plaintiff could not violate its own process. In fact, the concluding quotation from *Maloney* v. *King* seems to suggest the very procedure followed by the defendant in the case at bar as proper.

We do not see anything in the case to support Judge Lindley's conclusion except that the opinion is somewhat confused.

What the Montana Court criticised was the defendants instituting new suits instead of calling to the attention of the Court the violation of the injunction by the complainant therein. There the complainant was the owner of the surface and protecting its own common law rights, whereas the reverse proposition exists in the case at bar because the defendant is *prima facie* the owner of the property and *prima facie* entitled to judgment.

The concluding paragraph of the opinion in *Maloney* v. *King* is applicable to our theory but not to our opponents' views.

In the case of *Johnson* v. *Hall,* 9 S. E. Rep., p. 783, from the Supreme Court of Georgia, complainant filed a bill for an injunction.

Upon hearing the case the Court enjoined the defendants and required Johnson, the complainant, to

give a bond according to the act approved October 13, 1885 (Acts 1884-85, p. 93).

Later the defendant filed a cross bill against complainant alleging that Johnson was doing the very acts which they had been restrained from doing, to wit: cutting and boxing trees, and praying an injunction.

Upon hearing, the Court enjoined the original complainant but did not require the original defendant to give a bond as had been required of the original complainant on the first injunction. The original complainant appealed.

The Supreme Court of Georgia said:

> "The Court committed no error in the ruling complained of. It appears from the record in this case that both of these parties are *bona fide* claimants to this lot of land. When Hall & Bro. were enjoined from trespassing thereon, upon the application of Johnson, Johnson had no right to commit the very act which Hall & Bro. had been enjoined from committing. Where both parties in good faith claim title to the same tract of land, and one of them is enjoined from entering or trespassing thereon upon the application of the other, the object of the injunction is to preserve the land *in statu quo* until the title is settled by the proper proceedings. The plaintiff has no more right to disturb the *statu quo* than the defendants had; and it follows, as a matter of course, that, when the plaintiff undertook to commit the same acts that the defendants had been enjoined from committing, the Court should have restrained him also, it appearing that both parties *bona fide* claimed the land. 1 High., Inj., Sec. 679."

But the Georgia Court went further and said they believed the original defendant on his cross bill should give a bond to Johnson.

This was because of the statute cited which required a bond upon an application for an injunction or for some other reason which does not appear; but in any event the original defendant became an actor, the original defendant asked for an injunction. The Georgia Statute must have required an injunction bond upon getting an injunction and the Court required such as the Statute was being used as a basis that the injunction be given.

It will be seen that 1 *High on Inj.,* Sec. 679, is given as authority by the Supreme Court of Georgia for the fact that the injunction is to maintain a *statu quo,* and that the complainant who brought about a *statu quo* could not violate it; and in the text of Section 679 of *High on Injunctions* the Wisconsin case of *Haight* v. *Lucia,* hereinafter cited, is given as authority for the proposition that the complainant will be prevented from violating his own process and abusing the same.

There was still another case cited to the Court below by counsel for our opponents but the same is not mentioned in the opinion of the Court.

That case was *Anaconda Co.* v. *Pilot Butte Co.,* 153 Pac., 1006.

The defendant in that case appealed against a temporary injunction which was given in a suit to quiet

title wherein the defendant counter-claimed as to its title.

When the action was commenced both parties applied for an injunction *pendente lite.*

The Court enjoined the defendant from mining within certain lines extended in their own direction on the plaintiff's so-called Emily vein.

The defendant's injunction was refused. The Supreme Court said furthermore the plaintiff was required to maintain *pendente lite* the present status as to that Emily vein below the 1800 foot level under the surface of defendant's claim and said, "Except as to that of course the application of defendant for the injunction was refused."

Inasmuch as the defendant's application for an injunction was refused and the Court said "except as to preserving the status below the 1800 foot level," the application was refused, the Court meant nothing else than that plaintiff was enjoined by the injunction that the complainant secured just as much as the defendant was enjoined.

The Supreme Court further said:

> "The order in legal effect grants a reciprocal injunction restraining both parties. If plaintiff should disregard it the Court would punish for contempt and thus preserve the vein until final judgment."

That is just exactly the case at bar and is what we have been contending for at all times.

We submit that these three cases are no basis on which to predicate the decision of the Court below; and respectfully further submit that the law of this case is as we have perhaps inadequately stated it, but which the authorities herewith submitted amply bear out.

AUTHORITIES.

OBJECT OF PRELIMINARY INJUNCTION IS TO PRESERVE STATUS QUO.

A preliminary injunction has been defined as follows:

> "It decides no fact, fixes no right and it is not at all necessary to final determination of the case. It is *mere process* of the Court issued to hold in *statu quo* the subject-matter upon which the decree is to operate until the Court should be enabled to ascertain and adjudicate the rights of the parties."
>
> *Tebo* v. *Hazel*, 74 Atlantic, 846.

> "An injunction being the 'strong arm' of equity, is never granted except in a clean case of irreparable injury, and upon full conviction on part of court of its urgent necessity."
>
> Sec. 22, *High on Injunctions.*

> "The *sole object* of an interlocutory injunction *is to preserve the subject* in controversy in its then condition and, without determining any question of right, merely to prevent the further perpetra-

tion of wrong or the doing of any act whereby the right in controversy may be materially injured or endangered."

Sec. 4, *Id.*

"It is to be constantly borne in mind that in granting temporary relief by interlocutory injunctions courts of equity *in no manner anticipate the ultimate determination of the questions involved.* They merely recognize that a sufficient case has been made out to warrant the preservation of the property or rights in issue in *statu quo* until a hearing on the merits without expressing or indeed without the means of forming a final opinion as to such rights."

Sec. 5, *Id.*

"Since the object of a preliminary injunction *is to preserve the statu quo* the court will not grant such an order where its effect would be to change the status."

Sec. 5-A, *Id.*

"Upon an application for injunction affecting the title to real estate, the proper office of the Court is not to ascertain the legal existence of a right, *but solely to protect the property* until that right can be determined by the tribunal to which it properly belongs."

Spelling on Injunctions (Sec. 181).

"Their object is to preserve the property in dispute in *statu quo,* and to protect it from injury until the hearing or further order."

Beach on Injunctions, Vol. I., Sec. 109.

"As the object of a preliminary or temporary injunction is merely to preserve the property in dispute in *statu quo* and to protect it from injury until the rights of the parties can be finally adjudicated, the Court will not, on the hearing of an application to grant or to vacate a preliminary injunction, decide questions of title to the property in dispute but will reserve such questions until the final hearing upon the merits."

Id., Sec. 110.

"The legitimate purpose and function of a temporary or preliminary injunction is to preserve matters *in statu quo* until a hearing; if it undertakes or if its effect is to dispose of the merits of a controversy without a hearing, or if it divests a party of his possession or rights in property without a trial, it is void."

Id., Sec. 112, p. 128.

Interlocutory injunctions are granted to *preserve the property and statu quo* pending the determination of the suit.

Pomeroy's Equity Jurisp., Vol. V., Sec. 264;
Pomeroy's Equitable Remedies, Vol. I., Sec. 264, p. 482.

"The controlling reason for the existence of the right to issue a preliminary injunction is that the Court may thereby prevent such a *change of the conditions and relations of persons and property during the litigation as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated.*"

Note 6, *Pomeroy's Eq. Jurispr., Id.*

"The object of an interlocutory injunction is to *maintain the matters in question in the suit in statu quo,* until the hearing of the cause."

Daniels Ch. Pl. & Pr., 6th Am. Ed., Vol. 2, star page 1661 (bottom paging, p. 1660).

"Where a party sues in respect to an alleged injury to his legal rights, it seems that *an interlocutory injunction is granted solely upon the principle of preserving property until a decision on the legal rights can be had.*"

Id., p. 1640, bottom paging, p. 1633.

"A preliminary injunction, or, as it is sometimes called, injunction *pendente lite,* is a provisional remedy granted before the hearing on the merits for the purpose of preventing the perpetration of wrong, or the doing of any act whereby the rights in controversy may be materially injured or endangered before the final decree, and its purpose *is to preserve the subject of controversy until an opportunity is afforded for a full and deliberate investigation.*"

Ency. of Pleading & Practice, Vol. 10, p. 878.

"The right asserted by complainant, however, must be perfectly clear and free from doubt *where the effect of a preliminary injunction will be more than merely the maintenance of the status quo,* or where the injunction will cause defendant greater loss and inconvenience than that which will be suffered by the complainant in the absence of an injunction."

Cyc. of Law & Proc., Vol. 22, p. 752.

What is *status quo?*

"And by the *status quo* which will be preserved by preliminary injunction is meant the *last actual, peaceable, non-contested* condition *which preceded* the pending controversy."

High on Injunctions, Sec. 5a, p. 10.

"The modern cases, therefore, have established the rule that the *status quo* which will be preserved by preliminary injunction *is the last actual, peaceable, non-contested status which preceded the pending controversy."*

Frederick v. *Huber,* 37 Atl. Rep., p. 90.

(Italics ours.)

PRELIMINARY INJUNCTION BINDS ALL PARTIES HAVING KNOWLEDGE THEREOF AND ANY VIOLATION OF STATUS QUO IS GROSS ABUSE OF ORDER OF COURT.

"Where an interlocutory injunction is awarded a complainant, he should not be allowed to do with impunity that which he has restrained the defendant from doing."

Lindley on Mines, Vol. III, Sec. 872, p. 2193.

"The violation of his own injunction by plaintiff, *where its purpose is to preserve the existing status, is a gross abuse* of the mandate of the Court, for which the injunction may be dissolved."

Beach on Inj., Sec. 289, p. 302, Vol. I.

"So it is said to be *gross abuse* of the process of the Court for him (complainant) after *having by means of the injunction tied the hands of his adversary, to disregard his own injunction.* So this principle was applied where an injunction was granted restraining defendant from mining or disposing of any ore pending the suit and complainant subsequently ejected defendant and took possession of the mine."

Joyce on Injunctions, Vol. I, Sec. 256-a, p. 407.

"And where plaintiff in an action of ejectment, having obtained an injunction to prevent waste by defendant on land, the principal value of which consisted in its pine timber, went upon the land with a force of men and cut a large quantity of timber with the purpose of removing it, it was

held that for this *abuse* of the process of the Court, the injunction might, on defendant's application, have been revoked."

Id., Sec. 1187, p. 1717.

"In ejectment for the recovery of lands which are chiefly valuable for their timber, when plaintiff before establishing his right obtains an injunction restraining defendants from the commission of waste and then immediately proceeds to cut timber upon the premises for the purpose of removing it, such action is regarded as a violation of the spirit of the injunction and as a gross abuse of the process of the Court which would justify the dissolution of the injunction should the application be made."

High on Injunctions, Sec. 679.

"Wherever there is grave doubt as to the ultimate ownership of the ore or coal, and where the plaintiff shows a *prima facie* case, as in a case of disputed boundaries, *the Court that did not tie the hands of both parties pending the final hearing* would be, to say the least, not alert to the justice of the situation."

Snyder on Mines, Vol. 2, Sec. 1626.

". . . The meaning is, that whatever be the nature of the controversy between two definite parties, and whatever be the nature of the remedy demanded, this Court will not confer its equitable relief upon the party seeking its interposition and aid, *unless he has acknowledged and conceded, or will admit and provide for, all the equitable rights, claims, and demands justly belonging to*

the adversary party, and growing out of or necessarily involved in the subject-matter of the controversy. It says, in effect, that the Court will give the plaintiff the relief to which he is entitled, only upon condition that he has given, or consents to give, the defendant such corresponding rights as *he* also may be entitled to in respect of the subject-matter of the suit. This meaning of the principle was more definitely expressed by an eminent judge in the following terms: 'The Court of equity refuses its aid to give to the plaintiff what the law would give him if the courts of common law had jurisdiction to enforce it, without imposing upon him conditions which the Court considers he ought to comply with, although the subject of the condition should be one which the Court would not otherwise enforce.' In this narrow and particular sense the principle becomes a universal rule governing the courts of equity in administering all kinds of equitable relief, in any controversy where its application may be necessary to work out complete justice."

Pomeroy's Equity Jurisprudence, 3rd Edition, Vol. I, Sec. 385.

". . . But this is not indispensable, nor is it even always possible. The rule may apply, and under its operation an equitable right may be secured or an equitable relief awarded to the defendant which could not be obtained by him in any other manner,—that is, which a court of equity, in conformity with its settled methods, either would not, or even *could* not, have secured or conferred or awarded by its decree in a suit brought for that purpose by him as the plaintiff."

Sec. 386, *Id.*

". . . And for this purpose the plaintiff will be required, as a condition to his obtaining the relief which he asks, to acknowledge, admit, provide for, secure, or allow whatever equitable rights (if any) the defendant may have, and to that end the Court will, by its affirmative decree, award to the defendant whatever reliefs may be necessary in order to protect and enforce those rights. This principle is not confined to any particular kind of equitable rights and remedies, but pervades the entire equity jurisprudence, so far as it is concerned with the administration of equitable remedies."

Sec. 388, *Id.*

"It must be conceded that Courts should exercise due discretion in granting injunctions to restrain alleged irreparable mischiefs. Parties are sometimes improperly restrained, to their serious injury. When the title of the plaintiff is disputed in the answer, the Courts should be still more cautious. But in all cases, it is matter of sound discretion. It may be properly said, however, that when there is reasonable ground to apprehend the commission of irreparable mischief, pending the litigation, and the title be matter of doubt, *the Courts should restrain both the parties,* or appoint a receiver, under proper circumstances. *The party restrained, in a case of reasonable doubt, has, at least, these advantages:* First, *The property is left untouched for the time, and, upon the termination of the suit in his favor, returns to him unimpaired.* Second, He has not only his remedy against the opposite party, but also against his sureties. But in case the party is not restrained, and the suit should terminate adversely to him, the other party must rely solely upon his personal responsi-

bility. It is true, notwithstanding all these advantages, he may suffer very seriously; but as it is matter of doubt who has the right, and some one must incur the risk pending the litigation, the risk would be less on his than on the other side."

7 Cal. Reports, Merced Mg. Co. v. *Fremont,* p. 328.

"The fundamental question in every suit in equity is, on which side is justice? Law, unfortunately, is sometimes not justice; but equity always is,—so much so that in one of the townships within this judicial district the justice of the peace is understood to maintain on one page of his docket 'The Justice's Court' of law, and on the opposite page a 'Court of Justice,' and to give to suitors before him the choice of forums. There may not be any law for such action on the part of that distinguished magistrate, but Congress has constituted the Circuit Courts of the United States, both courts of equity and courts of law, and all suits that are here brought on the equity side of the Court must be governed and controlled by the eternal principles of right."

Cosmos Co. v. *Gray Eagle Oil Co.,* Vol. 104 Fed. Rep., p. 20.

"Where as in this case the evident purpose of the writ is to preserve the existing status of property in litigation until a final adjudication can be had, it is *gross abuse* of the process of the Court for the complainant to disregard his own injunc-

tion after having by means thereof tied the hands of his adversary."

Van Zandt v. *Argentine Min. Co.,* 48 Fed., 770.

"Before leaving the case we deem it our duty to refer to the fact, which appears in the record, that immediately after he had obtained an injunction, which in effect, restrained the defendants from cutting timber on the premises in controversy (each party claiming to be the owner of such premises and timber), the plaintiff, with a number of employees, entered upon the premises and felled a large quantity of the timber thereon. At that time neither party had established a right thereto. In that respect they were on equal ground. If there were valid reasons for restraining the defendants from cutting the timber, it was proper for the same reasons to restrain the plaintiff from doing the same act. *Evidently the spirit of the injunction was to* preserve the property in controversy so that the prevailing party might have it unimpaired. The plaintiff invoked the extraordinary powers of the Court to accomplish that purpose *and then in entire disregard of the object and spirit of the injunctional order which he had obtained attempted to seize and appropriate to his own use the most valuable portion of the property in controversy before his right thereto had been adjudicated. This was a gross abuse by the plaintiff of the process of the Court, which to say the least should have been severely censured by the Court. Had an application therefor been made the Court would have been justified had it dissolved the injunction and refused further to exercise its discretionary powers for the protection*

of the plaintiff. Courts should see to it that their process be not used as instruments of wrong and oppression.

Haight v. *Lucia,* 36 Wis., 356, 361-2.

"The effect of the injunction was to restrain him from the commission of the acts mentioned in the injunction. It did not restrain the complainant from the commission of any act. There are, however, numerous and well-considered cases where the courts have held that, although the complainant was not restrained, he could not 'with impunity do the acts which at his instance the defendant has been restrained from doing,' and that, where the evident object and purpose of the writ are to preserve the existing status of the property involved in litigation until a final trial and adjudication can be had, 'it is a gross abuse of the process of the Court for the complainant to disregard his own injunction, after having, by means thereof, tied the hands of his adversary.' . . . There is no doubt, therefore, that upon a proper showing to the effect that a complainant is not acting in good faith, and has either sought for and obtained, or uses, an injunction for the purpose of enabling him to obtain an undue advantage over the opposing party, the Court could and should interfere to prevent the commission of any act by the complainant having that tendency by restraining him, as well as the defendant, from doing such acts, or any act that would materially disturb the existing status of the property in litigation; or, as is held in some of the authorities above cited, the Court might dissolve the injunction against the defendant."

Silver Peak Mines v. *Hanchett,* 93 Fed., 76, 77-8.

"The word 'Irreparable' means that which can not be repaired, restored, or adequately compensated for in money or where the compensation can not be safely measured. . . . An injury to realty may be incapable of compensation in money for several reasons. 1. It may be destructive of the very substance of the estate. 2. It may not be capable of estimation in terms of money. 3. It may be so continuous and permanent that there is no instant of time when it can be said to be complete so that its extent may be computed. 4. It may be vexatiously persisted in in spite of repeated verdict. . . .

" 'Where the defendant is engaged in removing from the complainant's estate that which constitutes its chief value—for instance, lumber—the case is one peculiarly within the province of a court of equity through its preventive writ to interpose and stop the mischief complained of and preserve the property from destruction. And if a preliminary order restrains one of the parties from interference with the property in dispute *and leaves the other free to so interfere, the Court will modify such order so as to do equal justice to the parties and keep the property in statu quo until the determination of the controversy as to title and their respective rights.* . . . If it undertakes, or if its effect is, to dispose of the merits of a controversy without a hearing, or if it divests a party of his possession or rights in property without a trial, it is void.' 1 *Beach on Injunction,* Secs. 110, 112."

Bettman v. *Harness,* 42 W. Va., 433; 36 L. R. A., 571.

PRELIMINARY INJUNCTIONS CANNOT OPERATE TO CHANGE THE POSSESSION.

"Hands off of any and everything within my surface lines, extending vertically downward, until you *prove* that you are working upon and following a vein which has its apex within your surface claim."

Consolidated Wyoming Gold Min. Co. v. *Champion Min. Co.* (C. C.), 63 Fed., 540 (Judge Hawley).

Quoted approvingly by the Circuit Court of Appeals, Ninth Circuit, in

St. Louis Mg. & Milling Co. of Montana et al., v. *Montana Mg. Co.,* 113 Fed., 900-903.

"It has been decided repeatedly that any decree or order divesting possession or rights on a preliminary inquiry, is illegal and void so that no one need respect or obey it."

T. & B. C. R. Co. v. *Iosco,* 7 N. W., p. 65, 66.

"No Court can by a preliminary *ex parte* order or process turn even a wrong-doer out of possession."

People v. *Simonson,* 10 Mich., pp. 335, 337.

"Under the earlier practice, both in England and in this country, equity refused to restrain trespasses to land, and left the party to his legal

remedy. As late as the time of Lord Thurlow, injunctions were refused in such cases. Even quite recently courts of equity have refused relief in such cases. But the evident injustice of permitting the actual destruction of the subject-matter in dispute during the delay necessarily incident to the establishment by judicial determination of the rights of the parties led the equity courts to interfere, not to decide the dispute as to the legal title, *but to save the property from destruction* until the law courts should, by a proper proceeding, adjudge the rights of the parties. In the Flamang Case, cited in *Hansen* v. *Gardiner,* 7 Ves., 307, Lord Thurlow in order to prevent irreparable mischief allowed an injunction, though the right of the complainant was not established; and in the Hanson Case Lord Eldon followed that authority. The jurisdiction assumed by the courts of equity in such cases is not for the determination of the controversy as to the title, *but simply for the preservation of the subject-matter in dispute from destruction."*

Johnson v. *Hughes,* 43 Atl. Rep., p. 901.

". . . the necessary effect of the order made by respondent, if heeded or enforced, would be to dispossess the relator, exclude him from the property, and transfer his possessory right to Phillips, who was left free to enter and reap where he had not sown. Phillips was, it is true, claiming the land; but he did not occupy it; and the injunctions were, therefore, not granted for the purpose of preventing a threatened invasion of a present actual possession. *Clearly the action of respondent in attempting to take from relator, without a hearing or an opportunity to be heard, the possession of real and personal property which he*

claimed, and still claims, was rightfully his cannot be justified as an exercise of judicial power.. The provisional injunction was never designed to transfer the possession of property from one litigant to another. A court or judge cannot thus dispossess a party, and then compel him to produce evidence and establish his title in order to obtain restitution. 'It has been decided repeatedly,' says Mr. Justice Campbell, in *Railroad Co.* v. *Iosco Circuit Judge,* 44 Mich., 479, 7 N. W., 65, 'that any decree or order divesting possession or rights on a preliminary inquiry is illegal and void so that no one need respect or obey it.' In *Calvert* v. *State,* 34 Neb., 616, 52 N. W., 687, a case which is in no material feature distinguishable from the one at bar, it was held that the provisional injunction allowed by the district judge was absolutely null. In the opinion, written by Maxwell, C. J., it is said: *'A temporary injunction merely prevents action until a hearing can be had. If it goes further, and devests a party of his possession or rights in property it is simply void.'* This statement seems to be fully sustained by the adjudged cases in other jurisdictions, and we have found no decision giving color or countenance to a contrary view. But whether the action of respondent be regarded as absolutely void, or only voidable, as his counsel contends, it is manifestly an abuse and perversion of process that ought to be speedily corrected."

State v. *Graves,* 92 N. W. (1902), 144.

"The court of chancery has no more power than any other to condemn a man unheard, and to dispossess him of property *prima facie* his, and hand over its enjoyment to another on an *ex parte* claim to it. In several cases it has been decided

that possession of lands is not to be disturbed by means of a preliminary injunction. *Hemingway* v. *Preston,* Wal. Ch., 528; *People* v. *Simonson,* 10 Mich., 335. Under the case last mentioned the injunction issued in this case might have been disregarded with impunity, and very serious questions might have arisen had the entrance of complainant upon the premises been resisted by force. A similar prejudgment of controversies, by the appointment of receivers, has been held in several cases to be wholly unwarranted by law. *Port Huron, etc. R. Co.* v. *Judge of St. Clair Circuit,* 31 Mich., 456; *Port Huron, etc. R. Co.* v. *Jones,* 33 Mich., 303."

Arnold v. *Bright,* 2 N. W. Rep., p. 16.

"While under certain circumstances a complainant out of possession may be awarded an injunction preventing destruction of the property, it should be in cases where an action at law is either pending or contemplated, and ancillary thereto so as to preserve the *status quo.*"

Buchanan Co. v. *Adkins,* 175 Fed., pp. 692-698 (C. C. P.). (1909.)

". . . it is only those who have a clear legal title to land, as well as its actual possession, who have a right to claim the aid of a court of equity to give them peace."

Id., pp. 698-699.

"An injunction requiring a party to do a par-

ticular thing, as to surrender possession of premises, is never allowed before final hearing."

Kamm v. *Stark,* 1 Sawyer, 547;
Daniels Ch. Pl. & Pr., Vol. 2, 6th Am. Ed., star p. 1662, end of note 2.

"There are cases in which it is said that, although the only equity ground of jurisdiction was a necessity for the exercise of the restraining power of the Court by injunction, equity went on and passed upon the legal rights of the litigants, but in every instance the case was one of accident, fraud, mistake, or account, belonging to the general concurrent jurisdiction of equity; *in no case has any court proceeded so far as to hold that, having taken jurisdiction to restrain a trespass to real estate, it would go on and determine the legal title to the land, when that was in dispute and a trial by jury was necessary, by reason of controverted matters of fact, such as possession,* boundary and location. On the other hand, there is an abundance of authority holding the contrary doctrine."

Freer v. *Davis,* 59 Law. Rep. Ann., W. Va., pp. 556, 560, 561.

FEDERAL EQUITY COURT CANNOT ENTERTAIN BILL TO TRY TITLE TO LAND.

"In the Federal Court the application for preventive relief by injunction is an ancillary proceeding and requires the institution of a separate equitable action in aid of the action at law."

Lindley on Mines, Vol. III, Sec. 872, p. 2194.

"Equity will not entertain a bill merely to try and enforce the legal title to land. . . . Where irremediable waste is being done or threatened the authority of the Court is exercised in such cases, through its preventive writ, *to preserve the property from destruction* pending legal proceedings for the determination of the title."

Erhardt v. *Boaro*, 113 U. S., 537.

"The ancient rule of non-interference of courts of equity with trespass to real estate, the title to which is in dispute, has been relaxed, but to what extent? Only to the extent that courts of equity, *when the injury is such as tends to the destruction of the property*, and is, therefore, irreparable, and justice requires that the act of trespass be prevented until the title can be determined in a court of law, will so prevent it by injunction. That is the limit set by the authorities. Citing in *Erhardt* v. *Boaro*, 113 U. S., 538, . . . *High on Inj.*, Sec. 732, says:

"'The jurisdiction in restraint of trespass to mines is not an original jurisdiction of equity, under which the Court would be justified in trying the title to the mines themselves, and the party aggrieved must, therefore, first establish his title at law, or show satisfactory reason for not doing so.'"

Freer v. *Davis*, 59 Law. Rep. Ann., p. 561.

The real object of complainant is "to settle adverse titles, . . . to secure possession of land held by others, . . . to obtain by the decree of a chancellor that which under our jurisprudence can only be had by a judgment rendered on the verdict of a jury. Sec. 723, U. S. Comp. St.

1901, p. 583, is as follows: 'Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law.' All suits which have for their object a judgment for the recovery of either real or personal property should be prosecuted on the law side of the Courts of the United States, and this rule cannot be obviated by an allegation of fraud, or a conspiracy, because of the constitutional right of the defendants to a trial by jury."

Buchanan Co. v. *Adkins,* 175 Fed. Rep., p. 700.

For the reasons stated we ask that the judgment of the lower Court be reversed, and the injunction in said case be dissolved.

W. H. METSON,
FRANK R. WEHE,
BRUCE GLIDDEN.

METSON, DREW & MACKENZIE, and
E. H. RYAN,
Of Counsel.

No. 2909

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit.

TWENTY-ONE MINING COMPANY, a Corporation,

Appellant,

vs.

ORIGINAL SIXTEEN TO ONE MINE, INC., a Corporation,

Appellee.

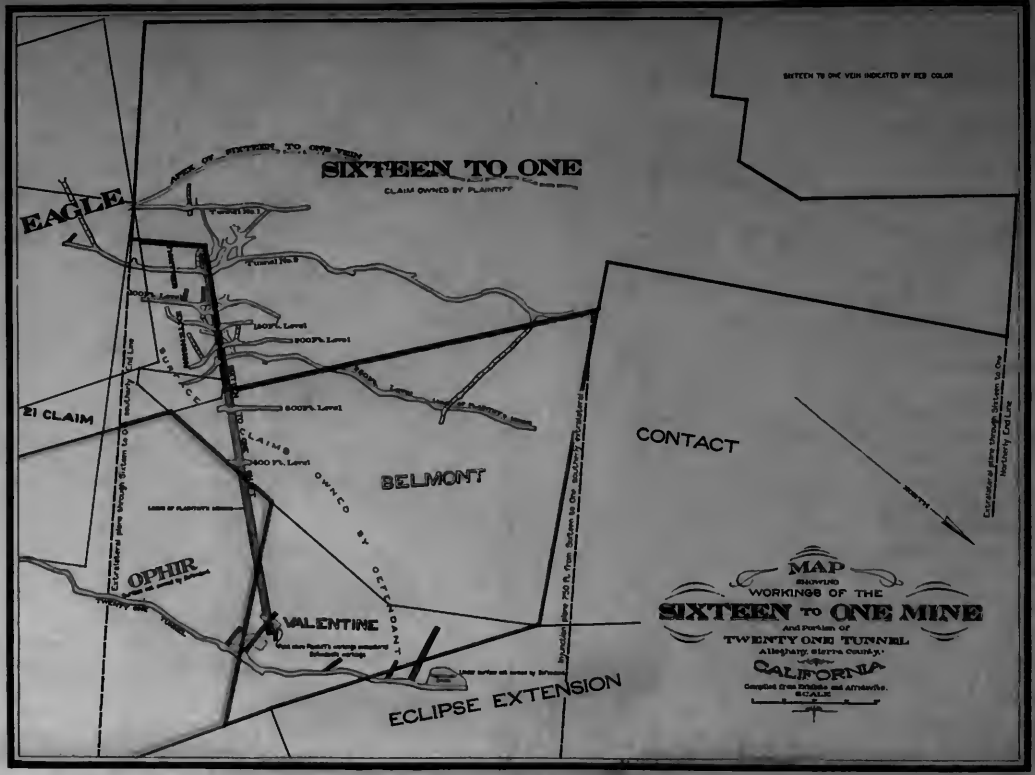
BRIEF FOR APPELLEE.

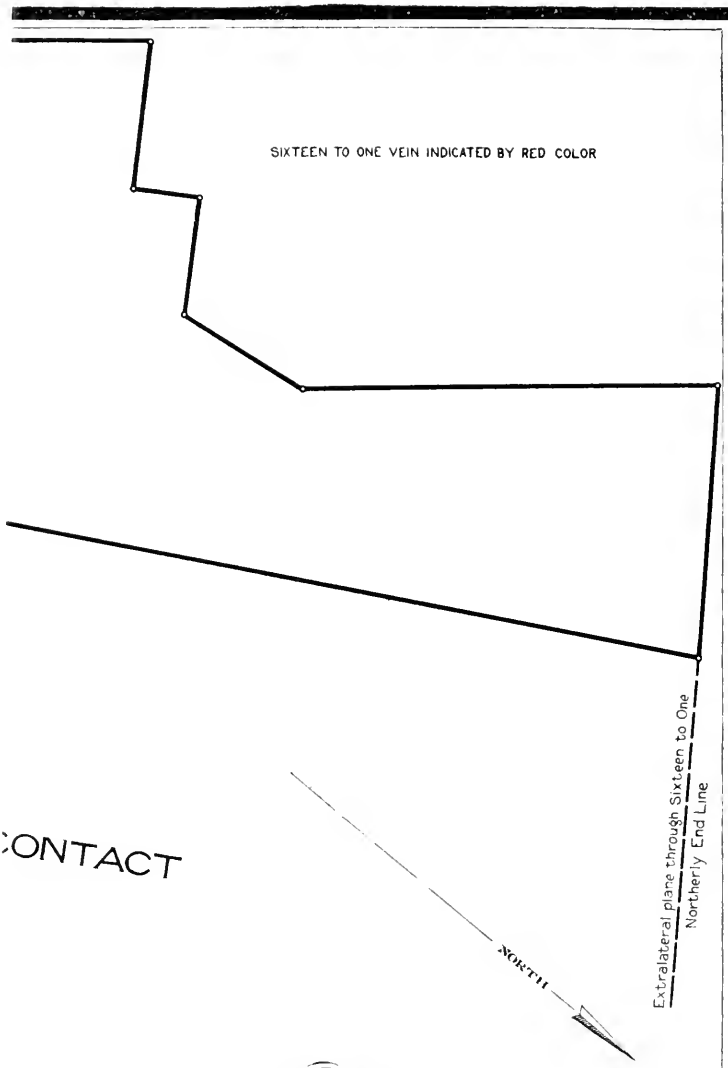
WM. E. COLBY,
GRANT H. SMITH,
Attorneys for Appellee.

Filed this 1st day of February, A. D. 1917.

FRANK D. MONCKTON,
Clerk.

By ——————————,
Deputy Clerk.


SIXTEEN TO ONE VEIN INDICATED BY RED COLOR
SIXTEEN TO ONE
CLAIM OWNED BY PLAINTIFF
EAGLE
21 CLAIM
BELMONT
CONTACT
OPHIR
VALENTINE
ECLIPSE EXTENSION
MAP
SHOWING
WORKINGS OF THE
SIXTEEN TO ONE MINE
And Portion of
TWENTY ONE TUNNEL
Alleghany, Sierra County,
CALIFORNIA
Compiled from Records and Affidavits.
SCALE



MAP

SHOWING

WORKINGS OF THE

SIXTEEN TO ONE MINE

And Portion of

TWENTY ONE TUNNEL

Alleghany, Sierra County,

CALIFORNIA

Compiled from Exhibits and Affidavits.

SCALE

No. 2909.

In the United States Circuit Court of Appeals for the Ninth Circuit.

TWENTY-ONE MINING COMPANY, a Corporation,

Appellant,

vs.

ORIGINAL SIXTEEN TO ONE MINE, INC., a Corporation,

Appellee.

Brief for Appellee.

STATEMENT OF THE CASE.

The statement of the case appearing in appellant's brief omits many facts which are material to a presentation of this appeal from appellee's standpoint, and in order that these omitted facts may appear in their proper sequence, the following restatement of the case is made:

For purposes of explanation and convenient reference, two plats are inserted in this brief, which show the mining properties of both parties, the mine workings and the vein, in horizontal and in vertical sections. (Opp. p. 20 of this brief, for vertical section.)

The plaintiff below (appellee) is the owner of the Sixteen to One lode mining claim. Defendant (appellant) is the owner of the Belmont, Tightner Extension, and Valentine claims. The Ophir and the Eclipse Extension claims, shown on the map, belong to third parties. For many years prior to the com-

mencement of this action, plaintiff and its predecessors in interest were engaged in developing the Sixteen to One vein, which apexes in said claim and extends on its dip beneath the surface of the adjoining Tightner Extension, Belmont, and Valentine claims, owned by defendant. Plaintiff had sunk the "Sixteen to One Shaft," following down upon or in the immediate vicinity of the Sixteen to One vein, until, in August, 1916, at a depth of about 700 feet, on the inclination, plaintiff's shaft connected with an upraise of defendant, which extends a short distance upward on the vein from defendant's "Twenty-one Tunnel," which tunnel enters the mountain far below plaintiff's workings. Plaintiff thereupon found that defendant was actively engaged in mining high-grade ore from the stope marked "Trespass Stope" on the map, which is more than 700 feet below the apex of the vein measured on the dip or inclination (Tr. 17, 22, 29), and vertically beneath the surface of the Eclipse Extension claim, owned by a third party. Finding that the vein in defendant's workings, and on which defendant was mining, was plaintiff's Sixteen to One vein—contrary to the claim theretofore made by defendant that it was mining on a different vein (Tr. 60)—plaintiff immediately filed an action for damages on the law side of the court below (Tr. 8), and, ancillary thereto, filed a bill in equity for the purpose of preventing a continuance of the alleged trespass (Tr. 1).

The court below issued a temporary restraining order, and, after a hearing, issued a preliminary in-

junction directed against defendant and conditioned upon the filing by plaintiff of a bond for $30,000 to indemnify defendant if wrongfully restrained, which bond was filed (Tr. 93).

For some time prior to the commencement of these actions plaintiff, in the orderly progress of its mining operations, had been engaged in mining extralaterally on the Sixteen to One vein, as it passed on its dip immediately beyond the surface of its Sixteen to One claim, and, at the time the restraining order was issued, was working and extracting ore on its 250 foot level and vicinity, directly beneath the surface of defendant's Belmont claim (Tr. 102). Defendant's motion to dissolve the injunction against it was based upon the resumption of mining by plaintiff at this point.

Immediately upon the issuance of the order restraining defendant, on or about August 2, 1916, plaintiff voluntarily ceased work outside of its vertical boundaries upon advice of its counsel, and this cessation continued after the issuance of the preliminary injunction (Tr. 107, 108). In order to relieve itself from the hardship of such cessation (Tr. 110), plaintiff, on October 3d, 1916, filed a notice of motion to compel defendant to furnish a bond to indemnify plaintiff against the damage it was suffering by reason of its cessation of work on the extralateral segment of its vein and the consequent inability to operate its plant pending this litigation (Tr. 88). This vein is the main vein of the Sixteen to One claim, and presents practically the only opportunity for plaintiff to develop ore.

Within the vertical boundaries of the Sixteen to One claim there is a very limited opportunity for discovering and developing ore (Tr. 108), and, if plaintiff were compelled to cease mining on the Sixteen to One vein extralaterally, it would have to shut down its plant and would suffer material damage and great hardship (Tr. 101, 109).

On October 9, 1916, the court below denied this motion, stating that the matter was not properly before it for determination (Tr. 101). For the sole purpose of testing the matter and obtaining relief from this hardship, and acting under advice of counsel, plaintiff, on or about October 10, 1916, caused defendant to be notified in writing of plaintiff's intention to proceed with the extraction of ore extralaterally, stating that the object of such mining was to raise squarely the question as to whether or not plaintiff was entitled to the protection of a bond (Tr. 103).

Thereafter, on or about October 11, 1916, for the reasons above given, and in pursuance of said notice, plaintiff resumed mining extralaterally on its Sixteen to One vein, vertically beneath defendant's Belmont claim, in the vicinity of its 250 foot level and but a short distance eastward from the vertical side line boundaries of its Sixteen to One claim.

On November 17th, 1916, and more than a month after plaintiff had resumed mining, defendant served and filed its notice of motion to dissolve the preliminary injunction theretofore secured by plaintiff, basing the motion on the ground that plaintiff had resumed mining, as aforesaid, and had

thereby violated the spirit of the injunction (Tr. 94).

Thereafter, on November 21, 1916, Honorable William H. Hunt, sitting in the place of Honorable William C. Van Fleet, heard the statements of the respective parties on the motion and ordered plaintiff to cease operations under defendant's surface until Judge Van Fleet could hear and decide the matter (Tr. 99–100). On December 22, 1916, Judge Van Fleet, after conferring with Judge Hunt, as stated in the Memorandum Opinion (Tr. 89), denied the motion but granted the defendant, if it so desired, a cross-injunction restraining the plaintiff pending the suit from further prosecuting mining operations extralaterally, on the disputed vein, upon defendant giving a bond in the sum of $30,000 to indemnify plaintiff against any damages suffered by plaintiff from such restraint (Tr. 90). Defendant has not seen fit to avail itself of this privilege but has taken this appeal from the order denying the motion.

ARGUMENT.

THE QUESTION PRESENTED BY THIS APPEAL.

Defendant appears to believe that the injunctive order against it should be dissolved, because plaintiff continued its mining operations after defendant was restrained. We are certain that no such result will follow, because the dissolution of an injunction is largely in the discretion of the trial court, and it

is plain that such discretion has not been abused. The record clearly shows that plaintiff's action was not contemptuous and not in violation of the spirit of the injunction. Plaintiff gave notice of its purpose, both to the trial court and to defendant, and, as has been stated, sought the aid of the trial court to secure indemnification before resuming work.

Practically, the only question for this court to determine is whether, under the circumstances of this case, plaintiff is equally bound by the injunction issued against defendant.

While defendant has specified several errors in its assignment (Tr. 115–118), they are obviously designed to cover the one situation raised by the denial of the motion to dissolve the injunction, and they can all be resolved into the one question which is here presented for determination, to wit:

Will equity compel plaintiff to cease mining on the vein in dispute (in workings long in its possession and which have never been in the possession of defendant), without any indemnification against the damage to be suffered thereby, merely because plaintiff has caused defendant to be restrained, under the protection of a heavy bond, from mining ore in said vein at a point remote from plaintiff's workings?

Defendant was properly given the protection of a bond indemnifying it against damage occasioned by the issuance of the injunction restraining it from mining. Can it be the rule of equity that plaintiff, because it attempts to protect its property, must suffer identical damage by reason of cessation of its

mining operations, and be denied the protection of a similar bond?

If defendant's contention is upheld, it amounts to this: A complainant that comes into court to restrain another from destroying its property must suffer, as a penalty for commencing such proceeding, a complete renunciation of its own rights. By being the actor or moving party in the court, plaintiff automatically restrains itself and is not entitled to the same protection by bond that defendant enjoys, even though plaintiff suffers similar damage. In other words, an injunction operates equally on both parties and on different segments of the vein, and the one first enjoined is the only party entitled to indemnification.

It has been held in some cases, and under certain conditions, that an order of injunction binds both parties equally; but the rule depends upon the facts, and our argument is directed to the facts in this case.

When this action was begun, defendant was mining on the vein at much greater depth than plaintiff, being able to enter the vein through its tunnel some 700 or 800 feet below the apex of the vein, measured on its dip. Defendant, at the time, was mining and extracting high-grade ore from the "Trespass-Stope" on the Twenty-one tunnel level and vertically beneath the Eclipse Extension claim belonging to a third party. Several hundred feet above where defendant was working, plaintiff for some time prior, and up to the commencement of these proceedings against defendant, had been mining in the vicin-

ity of its 250-foot level on its main Sixteen to One vein as it passed on its dip outside of the vertical boundaries of its Sixteen to One claim; a portion of which level is situated vertically beneath Sixteen to One surface and the remainder beyond and beneath the surface of defendant's Belmont claim.

Plaintiff, wishing to be absolutely fair and equitable in the matter, though suffering serious loss thereby (Tr. 109, 110), upon the issuance of the injunction against defendant, ceased working underneath defendant's Belmont surface and gave defendant ample time and opportunity to apply for a cross or reciprocal injunction. No such application was made.

Instead of seeking this plain, equitable and appropriate relief, defendant waited for more than a month after plaintiff had resumed mining and made the motion to dissolve the injunction already issued against it.

Because plaintiff had used every rational means to compel defendant to meet the situation and do the fair and equitable act of indemnifying plaintiff against the same damage that plaintiff had secured defendant against, the contention is advanced by defendant that plaintiff violated the injunction which by its own terms was directed solely against defendant and its associates.

The direct result of granting defendant's motion would have been to leave both parties without restraint of any kind and to have thrown open the door again so that defendant could proceed to extract "high-grade" ore without interference. The Court

below, after due deliberation and conference with another judge who has had great experience in determining questions involving mining law, denied defendant's motion but, at the same time, gave defendant the opportunity to restrain plaintiff from further mining on complying with the same just and fair terms that plaintiff had earlier met in securing the injunction directed against defendant. Plaintiff at all times has been ready, as of necessity it must, to submit cheerfully to such restraint.

We respectfully submit that this situation speaks for itself, and upon grounds of plain, every-day justice and equity defendant should, in all fairness, do what plaintiff has already done, and willingly furnish a similar bond to indemnify plaintiff against similar damage and thus preserve the *status quo.*

THE EFFECT OF THE INJUNCTION ON POSSESSION.

The element of possession of the ore bodies in dispute and the effect of the injunction on such possession becomes an important factor in the consideration of this case. It has been made so much of by defendant's counsel, who throughout their brief have repeatedly stated that plaintiff "enjoined defendant out of possession and complainant into possession," that we shall endeavor to correct this erroneous statement and the erroneous conclusions which are built up on it.

It becomes necessary to go back to the situation existing prior to the issuance of the injunction. Plaintiff was in the exclusive possession of its Six-

teen to One claim and of the apex of the Sixteen to One vein on which it was mining, as this vein passed down on its dip beyond the side-lines of the claim and underneath adjoining territory owned by defendant. Just across its side-lines, in the vicinity of its 250-foot level, it was mining, and it was also engaged in sinking its incline shaft and extending therefrom the 300 and other levels and workings until finally at about the 700 level point it broke into defendant's upraise on the same vein extending a short distance up from the defendant's Twenty-one tunnel. Defendant's nearest workings were over 700 feet from the apex in plaintiff's claim measured along the inclination of the vein. As far as actual physical possession of workings and the segments of vein controlled by such workings was concerned, the plaintiff at all times had and still has possession down to the point where its workings encountered the rival workings of defendant. (This point is indicated on the surface map inserted herein.)

Defendant claims that it was enjoined out of possession and plaintiff into possession. Let us see the effect of the injunction on this actual physical possession of workings and mine openings and vein material controlled by such workings. *The injunction did not change this possession one iota.* Defendant is in possession of the same mine openings, the Twenty-one tunnel, the trespass stope and the ore bodies immediately controlled by such workings. Plaintiff could not enter these or take possession of them if it had that desire, without the permission

of defendant. Defendant retains possession, though restrained from mining, and the injunction had no effect whatsoever on such possession beyond such restraint. The trespass stope on the Twenty-one tunnel level is still in the actual physical possession of defendant, and defendant has never been enjoined out of possession of it and plaintiff has never been enjoined into possession of it. Plaintiff's mining operations, both prior to and since the issuance of the injunction, complained of by defendant, have been carried on in the vicinity of its 250 level and underneath Ophir surface, in workings that defendant never had any physical possession or control of, and that plaintiff had complete possession and control of both before and after the issuance of the injunction. Plaintiff's mining operations there were only the continuance of operations that it had been carrying on before the injunction issued. It is clear that as to the actual physical possession of plaintiff's workings, defendant was not enjoined out of possession, for it never had possession, nor was plaintiff enjoined into possession, because it already had such possession. So much for the alleged change of possession as far as actual and physical possession is concerned.

But, defendant's counsel assert, because of their ownership of the overlying surface embraced in the Belmont and Valentine claims, it was, from a legal standpoint, in possession of everything vertically beneath the surface, and that this vertical subsurface constructive possession covers the workings and min-

ing operations complained of. It should be noted that the injunction did not alter defendant's possession of the surface of its Belmont and Valentine claims. That surface is still in defendant's possession just as fully as it was prior to the issuance of the restraining process.

Let us see what happened to the possession below the surface, of the vein and ore bodies which were already clearly in the actual physical possession of plaintiff as far as plaintiff's actual workings and openings could control such possession. *Prima facie,* of course, ownership of surface is ownership of everything situated vertically beneath the surface, and possession follows legal ownership. This is defendant's argument, and is admittedly, in the absence of other controlling considerations, good common law. But this ordinary common-law rule gives way in the presence of "a location so made as to carry extralateral right," for under the mining laws of Congress possession of the surface is possession of all veins and lodes throughout their depths, the tops or apices of which are inside the surface lines, and such possession is actual and not constructive." (Lindley on Mines (3d ed.), p. 2162, sec. 865, and cases cited.)

See, also, Lindley on Mines (3d ed.), sec. 568, where he says:

> "The government being the owner of the fee may carve from it the ownership of the vein. . . . Therefore, when the Government grants a vein throughout its entire depth within certain end line planes, the title to the vein between

these planes is severed out of the adjoining land into which it penetrates, and the estate in the land overlying the dip is to that extent lessened'' (p. 1261).

''The estate thus granted in the vein is of the same dignity as that of a title in fee'' (p. 1262).

The federal statute granting the extralateral right gives the apex proprietor,

> ''*The exclusive right of possession and enjoyment* of all the surface included within the lines of their locations *and of all veins, lodes and ledges throughout their entire depth*—although such veins, lodes or ledges may so far depart from a perpendicular *in their course downward as to extend outside the vertical side lines of such surface locations.*'' (U. S. Rev. Stats., sec. 2322.)

[Italics in this brief are ours.]

Here we have a positive grant by Congress to the plaintiff of the exclusive right of possession of the Sixteen to One vein as it extends on its dip beneath adjoining surface, and we have, in addition to this exclusive right of possession, actual physical possession of these same vein segments down to the 700 level, where defendant's adverse entry and workings exist.

The following federal authorities have construed this section and abundantly support the foregoing proposition:

"It is contended that the Court erred in refusing to instruct the jury, at the request of the plaintiff in error, that the defendant in error was not in such possession of the vein as to maintain the action of trespass. It is urged that the possession of the apex of the vein in the surface of the St. Louis claim was not the actual possession of the vein, as it extended beneath the surface of the Nine Hour claim. We are able to discover no reason why the actual possession of the surface of a mining claim does not extend to all that belongs to the claim. Such a possession is not constructive, but actual. Said the Court in Mining Co. v. Cheesman, 116 U. S. 533, 6 Sup. Ct. 483, 29 L. Ed. 713:

" 'It is obvious that the vein, lode or ledge of which the locator may have "the exclusive right of possession and enjoyment" is one whose apex is found inside of his surface lines extended vertically; and this right follows such vein, though in extending downward it may depart from a perpendicular, and extend laterally outside of the vertical lines of such surface location.' "

Montana Min. Co. v. St. Louis Min. & Mill. Co., 102 Fed. 430, 435.

"It is objected that the present bill shows that the ore bodies in dispute are in the possession of the defendants, and not of the complainant,

and therefore that the latter has an adequate and complete remedy at law. The objection is untenable. Where the true owner of a mining claim is in possession of its surface, claiming title to the entire claim his possession in legal contemplation extends to everything which is part of the claim, whether vertically beneath its surface or within the extralateral right granted by Congress, which is not in the actual possession of another holding adversely. Clarke v. Courtney, 5 Pet. 319, 354, 8 L. Ed. 140; Hunnicutt v. Payton, 102 U. S. 333, 368, 26 L. Ed. 113; Montana etc. Co. v. St. Louis etc. Co., 42 C. C. A. 415, 420, 102 Fed. 430; Empire State etc. Co. v. Bunker Hill etc. Co., 58 C. C. A. 311, 315, 121 Fed. 973; Last Chance Mining Co. v. Bunker Hill etc. Co. (C. C. A.), 131 Fed. 579, 583."

U. S. Mining Co. v. Lawson, 134 Fed. 769, 772. (Affirmed in Lawson v. U. S. Mining Co., 207 U. S. 1.)

This proposition receives further reinforcement from the fact that where such carving out and severance of the vein takes place as results by virtue of the express grant contained in the statute just cited, possession of the surface is not in any sense possession of the underlying carved out and segregated segments of vein apexing outside of such surface. The situation is similar to that occurring in the eastern coal fields, where it is common practice to sever veins from the surface.

"This underlying estate may be conveyed under the same general rules, as to notice, as to recording and *as to actual possession,* as the surface. After such severance the possession of the holder of each estate is referable to his title. *The owner of the surface can no more extend the effect of his own possession downward* than the owner of the coal stratum can extend his possession upward, so as to give him title to the surface, under the statute of limitations."

Plummer v. Hillside Coal and Iron Co., (Penn.), 28 Atl. 853.

See, also, Farnsworth v. Barrett (Ky.), 142 S. W. 1049, 1052, which states that this is the general rule on the subject even at common law.

Much more, then, will the same rule operate where the Government has by express statute carved out and severed from overlying surface the veins apexing outside such surface and under which surface such veins may pass in their downward course. If defendant had obtained a patent for its Belmont and Tightner Extension claims, the United States would have inserted the following reservation therein:

"The premises hereby granted, with the exception of the surface, may be entered by the proprietor of any other vein, lode, or ledge, the top or apex of which lies outside of the boundary of said granted premises, should the same on its dip be found to penetrate, intersect or extend into said premises, for the purpose of extracting

and removing the ore from such other vein, lode or ledge."

This is the reservation inserted in all lode patents. Surely defendant will not claim that its title held under mining locations merely is greater in this respect than if it had obtained patents therefor.

PLAINTIFF'S PROOF OF POSSESSION IS OVERWHELMING.

On a motion to dissolve an injunction, the *burden of proof* is on the defendant.

> Edison Electric Light Co. v. Buckeye Electric Co., 59 Fed. 691, 701.

That plaintiff has assumed far more than its fair burden of proof on the injunction proceedings and shown the apex of the Sixteen to One vein to exist in its claim, and the vein on its dip to extend therefrom, with legal identity and continuity unchanged, to defendant's workings, see the following affidavits by eminent geologists and mining engineers filed in the court below by plaintiff at the time the injunction proceedings were heard:

> Affidavit of Fred Searls, Jr., (Tr. 11).
> Affidavit of George O. Scarfe (Tr. 24).
> Affidavit of S. B. Connor (Tr. 19).
> Counter-affidavit of Wm. A. Simkins (Tr. 81).
> Counter-affidavit of Andrew C. Lawson (Tr. 70).

Take, for example, the affidavit of Professor Lawson, who is recognized as one of the foremost econ-

omic geologists on the Pacific Coast. After describing in great detail the position of the apex of the Sixteen to One vein and its exposure in the various workings of the mine, he states (Tr. 78):

> "Affiant further declares that the vein thus followed practically continuously, except for two minor faults, from its apex on the surface of the earth, at the portal of the Number One tunnel of the Sixteen to One mine, to the Twenty-One tunnel level is the same vein as that exposed in the Twenty-one tunnel. . . .
>
> "That there is no essential interruption on the continuity of the vein from the Number One tunnel of the Sixteen to One Mine to the Twenty-one Tunnel, nor any reason to doubt its identity throughout; that there is no change in its physical characteristics, mineral contents, character of walls, general dip and strike or in any other feature to suggest that there may be two veins and not one."

All of the other affidavits referred to corroborate this affidavit of Professor Lawson's in great detail.

Opposed to these five affidavits filed by plaintiff, defendant has filed only one affidavit by an expert. (See affidavit of Ed. C. Uren (Tr. 51). The latter elaborates a fantastic theory that is not supported by evidence furnished by any mine openings or actual vein exposures. (See Map, Exhibit "B," attached to said affidavit.) It is entirely hypothetical and conjectural, and framed to suit the exigencies of defendant's case. It is illustrated on the

cross-section here inserted. In order to escape the inexorable logic of the almost continuous exposures of the Sixteen to One vein from its apex to the deepest workings, this affiant assumed the existence of another vein which would justify the trespass of the defendant, and for its *locus* selected a convenient place in the vicinity of the 500 level of the Sixteen to One shaft, where the vein had been left in the hanging above the shaft and no continuous connection made through on the Sixteen to One vein. He asserts in his affidavit that there are two distinct veins, an easterly vein disclosed in the Twenty-one tunnel and a westerly vein disclosed in the Sixteen to One upper workings (Tr. 55). Defendant's expert makes it appear on the cross-section, Exhibit "B" attached to his sworn affidavit, that the alleged easterly vein coming up from the Twenty-one tunnel on a uniform dip at or near the 500 level point of the Sixteen to One shaft takes a sudden turn upward almost at right angles with its previous dip, and he represents this distorted vein as being a different vein from the Sixteen to One vein (Tr. 55) and as conveniently apexing in claims owned by the defendant. Not only was there no vein actually disclosed at that point but several hundred feet of absolutely undeveloped territory without a single opening or vein exposure intervened between the hypothetical right angled turn up of the vein and the surface. The dip and position of the vein where disclosed in the Sixteen to One shaft immediately above this alleged distortion and its dip and position immediately below as also shown by actual

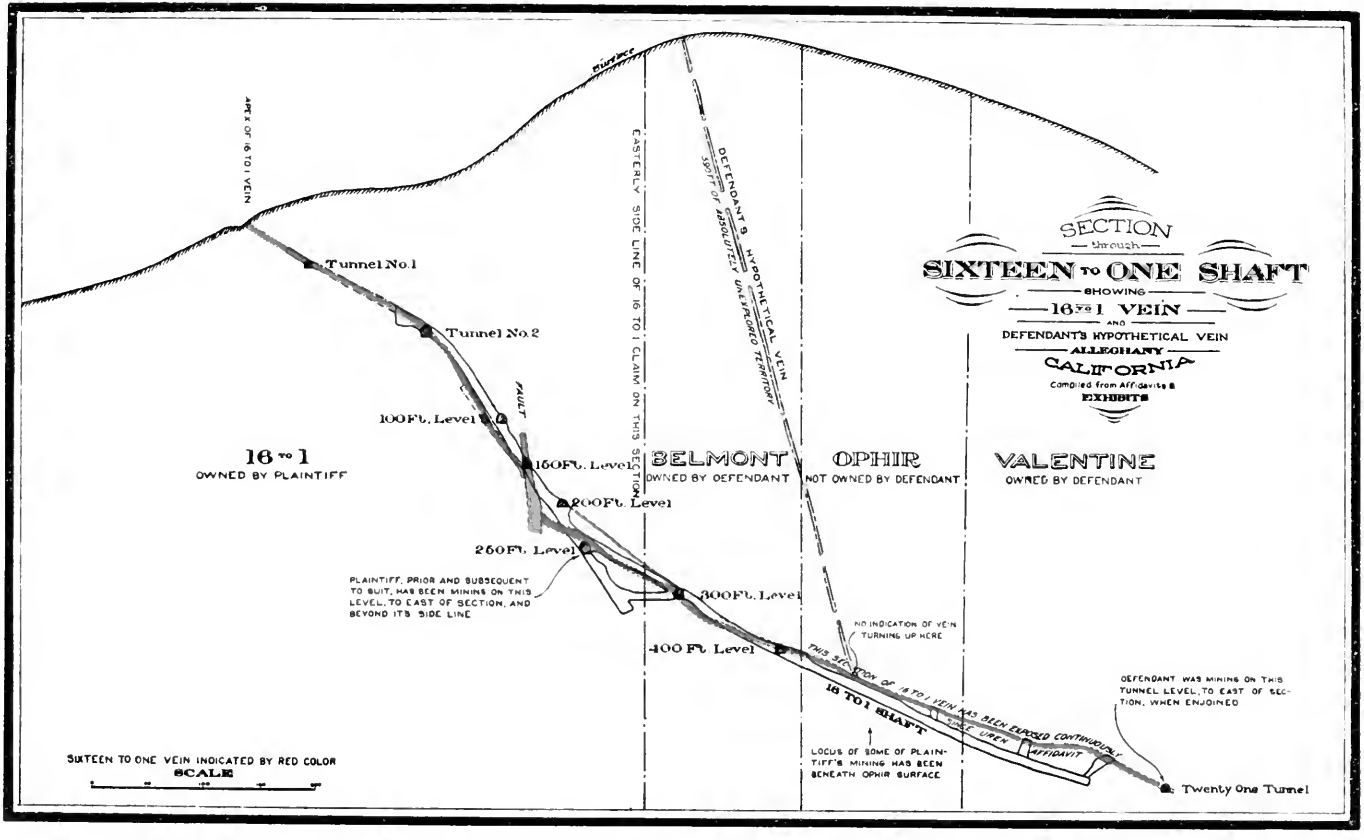
exposures of the vein were uniform and conformable so as to naturally lead to the conclusion that the known exposures were parts of one and the same vein. These facts speak for themselves, and it is quite evident that the theory of two distinct veins advanced in the Uren affidavit was for the purpose of justifying defendant's entry upon this vein by means of its Twenty-one tunnel and the extraction of ore therefrom. See cross-section plat here inserted exhibiting the true position of the 16 to 1 vein and also defendant's hypothetical vein.

That faults do not destroy the right to follow the vein extralaterally, see Lindley on Mines (3d ed.), pp. 1479–1482, of Sec. 615.

The Uren affidavit (Tr. 53) and attached map, Exhibit "A," also indicate that the apex of the Sixteen to One vein (conveniently for defendant) departs from the Sixteen to One claim through the westerly side boundary of the claim at a point just short of where an extralateral plane projected therefrom would embrace the trespass stope in which defendant was mining when enjoined.

Both of these convenient theories of defendant, which were advanced by one affiant only, in opposition to the affidavits of five experts filed by plaintiff, have been demonstrated to exist only in the imagination of that affiant.

The fact that the apex of the Sixteen to One vein is situated in the Sixteen to One claim substantially as represented by plaintiff's experts has, since the filing of said affidavits, been established by actual development. (Connor affidavit, Tr. 103,


SURFACE
APEX OF 16 TO 1 VEIN
EASTERLY SIDE LINE OF 16 TO 1 CLAIM ON THIS SECTION
DEFENDANT'S HYPOTHETICAL VEIN
SOUTH OF ABSOLUTELY UNEXPLORED TERRITORY
Tunnel No.1
Tunnel No.2
FAULT
100Ft. Level
150Ft. Level
200Ft. Level
250Ft. Level
300Ft. Level
400 Ft. Level
16 to 1
OWNED BY PLAINTIFF
BELMONT
OWNED BY DEFENDANT
OPHIR
NOT OWNED BY DEFENDANT
VALENTINE
OWNED BY DEFENDANT
PLAINTIFF, PRIOR AND SUBSEQUENT TO SUIT, HAS BEEN MINING ON THIS LEVEL, TO EAST OF SECTION, AND BEYOND ITS SIDE LINE
NO INDICATION OF VEIN TURNING UP HERE
THIS SECTION OF 16 TO 1 VEIN HAS BEEN EXPOSED CONTINUOUSLY SINCE WHEN
AFFIDAVIT
16 TO 1 SHAFT
LOCUS OF SOME OF PLAINTIFF'S MINING HAS BEEN BENEATH OPHIR SURFACE
DEFENDANT WAS MINING ON THIS TUNNEL LEVEL, TO EAST OF SECTION, WHEN ENJOINED
Twenty One Tunnel
SECTION
through
SIXTEEN to ONE SHAFT
SHOWING
16 to 1 VEIN
AND
DEFENDANT'S HYPOTHETICAL VEIN
ALLEGHANY
CALIFORNIA
Compiled from Affidavits &
EXHIBITS
SIXTEEN TO ONE VEIN INDICATED BY RED COLOR
SCALE

104.) That the alleged distortion and turning up of the vein as portrayed on Uren Exhibit "B" does not exist in fact, and the fact that the Sixteen to One vein disclosed in the upper workings of the Sixteen to One mine is the same vein appearing in the Twenty-one tunnel workings, has also been demonstrated by actual and continuous connection on the vein itself through the intermediate territory where such erroneous representation appears on Uren Exhibit "B." (Connor affidavit, Tr. 105.) Defendant has made no attempt to refute these established facts.

What is the effect of all this on defendant's present appeal? It establishes that defendant attempted to justify its mining on the Sixteen to One vein on the Twenty-one tunnel level at the time of the preliminary injunction, by this hypothetical distortion and assertion that an entirely distinct and easterly vein apexed in defendant's surface claims. Now defendant comes before the Court and asserts that the mining operations of plaintiff in the vicinity of its 250 foot level *are on the same vein* that appears in the Twenty-one tunnel below. See affidavit of J. H. Hunt, where he states that plaintiff's mining operations on the 250 foot level are "upon the same vein which the defendant herein is, and has been by said injunctive order restrained from working and extracting ore therefrom. . . . " (Tr. 96, 97.)

Defendant has repudiated the theory of two distinct veins advanced by said Uren at the time of the hearing on the preliminary injunction. It could

not well do otherwise in the light of subsequent disclosures. There is not now before this Court any theory by which defendant can justify its alleged claim to the ore on plaintiff's 250 foot level except ownership of surface, and, as we have pointed out, this must give way to the right of an apex proprietor who is also in actual physical possession of the vein by means of workings. As an additional interesting fact, the Uren map, Exhibit "B," filed by defendant indicates that Uren believed that the 16 to 1 vein continued down from its apex in 16 to 1 surface to within a few feet of his hypothetical turning up of the vein at right angles to its former uniform dip, for he so represents it extending down in red color.

We have gone thus extensively into the facts surrounding the element of possession because it has been so strongly urged and reiterated by defendant throughout its brief that it has been "enjoined out of possession" (which is true only to the extent of the restraint against mining the ore bodies on its Twenty-one tunnel level), and that "the plaintiff has been enjoined into possession," which is not true in any sense, for plaintiff was prior to the institution of this suit in the actual physical possession of the ore bodies it has been mining and also in the actual and constructive possession of the same by virtue of the apex statute, and the injunction did not give plaintiff possession of defendant's workings, for defendant still has possession of such workings. The injunction did not, therefore, alter the possession of the respective parties one iota.

Defendant has cited a number of cases on the effect of surface ownership and the possession of the subsurface resulting from such ownership. The very utmost that can be urged for those authorities is that they are either opposed to the authorities above cited holding that apex ownership results in actual possession of the vein throughout its depth, or they do not involve the situation here presented of actual physical possession by plaintiff of the underground workings and included ore bodies where plaintiff is mining.

The case of U. S. Mining Co. v. Lawson, 134 Fed. 769, 772, heretofore cited, concedes that even the apex proprietor would not be considered in possession "in respect of the ore bodies actually embraced" in the underground workings of another. How much stronger, then, is the possession of the plaintiff in contemplation of law which has actual possession of the underground workings in the vicinity of its 250 foot level and underneath Ophir surface, which workings embrace the ore bodies it is mining and where plaintiff has in addition to such actual physical possession the actual possession which flows from apex proprietorship?

The Court below had all these facts in mind when it denied defendant's motion to dissolve the injunction and was well aware of the fact that disclosures subsequent to the granting of the preliminary injunction had demonstrated the theory of the defense there made to be without foundation.

THE AUTHORITIES CITED BY DEFENDANT ARE NOT APPLICABLE TO THE SITUATION HERE PRESENTED.

Defendant's brief contains many statements of equitable principles, citation of supporting authorities and liberal quotations therefrom, which are unquestioned law and most of which we can cheerfully indorse. We cannot, however, accept the conclusions which defendant would have us draw from these principles, and with these conclusions we take issue.

It is true that the injunctive process is invoked for the purpose of preserving the *statu quo,* but the injunction in this proceeding is directed only against the defendant and its associates. It restrains them, and plaintiff must, as a condition precedent, furnish a bond to indemnify those who are restrained if it shall be eventually determined that the injunction was improvidently issued. Here there is no bond of a similar character to protect plaintiff from equally substantial damage, which it was suffering. In none of the authorities cited by defendant in support of its contention are facts similar to these presented. And it must be kept in mind that in injunctive proceedings of this character "each case must be decided upon the facts and circumstances presented," and that in a court of equity especially, rules are not iron-clad and inflexible as defendant argues, but that many times cases arise justifying "a departure from the ordinary practice. . . . "

Edison Electric Light Co. v. Buckeye Elec. Co., 64 Fed. 225, 228.

All of the authorities cited by defendant were cases where the party securing the injunction was acting unfairly and inequitably, and yet even in those cases, what the Court said was largely *dictum.*

Take the Van Zandt-Argentine case (48 Fed. 770) for example. There the plaintiff, after securing the injunction against defendant, ejected the defendant from the same ground and commenced mining where the defendant had just been mining. If the Sixteen to One Company, after securing the injunction against defendant, had forcibly ejected the defendant from its 21 tunnel and had commenced mining in the trespass stope where defendant was operating when enjoined, the facts would be similar. Instead, plaintiff, after giving defendant plenty of time and notice, merely resumed mining in ground it was already in possession of and where it had been mining before the issuance of the injunction. Is there anything inequitable about such conduct when defendant persistently refused to protect plaintiff by a bond? The Van Zandt case did not even hold the plaintiff there guilty of contempt, but only by way of *dictum* stated the generalizations which defendant here quotes and which we readily admit were justified by the grossly inequitable conduct of the plaintiff in that case. While we are discussing the effect of this case it may be well to note that the Court there said, "The writ of injunction did not restrain the complainant. . . . Its only effect was to restrain the defendant." While the Court did intimate that under the aggravated circumstances of that case an injunction should operate

reciprocally, it did not say that such operation should be effective as against the party securing it without the imposition of terms appropriate to the circumstances of each case, such as giving a bond to protect the party reciprocally restrained against serious loss. And the ordering of bonds or imposition of similar terms in connection with the issuance of injunctive process is peculiarly within the discretion of the court below. In this connection it should be kept in mind that the Van Zandt decision was rendered by the Court of first instance, and that consequently the Van Zandt decision is of no greater weight than the decision here appealed from, and a matter entirely in the discretion of the trial court to be viewed in the light of the peculiar circumstances of each case.

Most of the later authorities cite the Van Zandt case, and this is the basis for the generalized statement appearing in Lindley on Mines, and other texts, cited on pages 28–31 of defendant's brief. Many of these authorities state that the defendant is entitled to "corresponding rights" and that "the Court should restrain both parties," but nowhere do we find these authorities upholding the highly inequitable contention made by defendant here that the Court in granting defendant these reciprocal rights cannot impose on defendant the manifestly just burden of also securing plaintiff against the damage resulting to it from such restraint.

The Merced-Fremont case (7 Cal. 328), cited by defendant on pages 31, 32 of its brief, states that the Court should restrain both parties when title is in

doubt, but it nowhere announces the inequitable rule contended for by defendant here that they should both be restrained on unequal terms.

The case of Haight vs. Lucia (36 Wis. 356, 361, 362), cited on page 34 of opposing counsel's brief, was a case similar to the Van Zandt case, in that the plaintiff entered the very premises from which defendant had been enjoined and proceeded to cut the timber. It is also to be noted that the appellate court there said that the court below "would have been justified had it dissolved the injunction, etc." indicating what we most emphatically contend that such considerations rest exclusively in the sound discretion of the court below. The appellate court nowhere intimated that in restraining plaintiff, the Court below might not as a condition have required defendant to furnish a bond.

The Silver Peak-Hanchett case (93 Fed. 76, 77, 78), cited by defendant on page 34 of its brief, was a case where the appellate court refused to interfere and dissolve an injunction obtained below. The Court did state on the authority of the Van Zandt case that upon a showing that the plaintiff was not acting in good faith and that in securing the injunction it was seeking to obtain an undue advantage over the defendant, "the Court could and should interfere to prevent the commission of any act by the complainant having that tendency by restraining him," but it does not say that the Court cannot in taking such action impose on the defendant as a condition to such restraint the same just terms as have

been previously exacted of the plaintiff. The Silver Peak case expressly states that "the effect of the injunction was to restrain him [the defendant] from the commission of the acts mentioned in the injunction. *It did not restrain the complainant from the commission of any act.*" If such be the fact, then on what theory can defendant here claim that the Court in again acting to restrain plaintiff cannot impose such just and equitable conditions as the circumstances warrant? To argue that a court of equity is powerless to thus protect those subject to its jurisdiction is to argue that "justice must yield to empty phrases."

Defendant is impaled on its own weapon when it cites Beach on Injunctions (secs. 110, 112), on page 35 of its brief, for Beach there says that where one party is restrained and the other left free to interfere with the property in dispute, a Court will modify its order "*so as to do equal justice to the parties,*" etc. Is the Court doing equal justice where both parties are restrained and only one of them protected by a bond against grievous injury resulting from the restraint?

AUTHORITIES WHICH SUSTAIN PLAINTIFF'S CONTENTION.

Counsel for defendant, on pp. 15–20 of their brief, criticise and quote from the cases of Maloney vs. King (Mont.), 76 Pac. 940, and Johnson vs. Hall (Ga.), 9 S. E. 783, which, as they say, the Court below cites in its memorandum opinion in support of its refusal to dissolve the injunction against defend-

ant in this action. It is hardly necessary to amplify defendant's quotations from those cases, for they plainly state the rule and the practice in such cases and fully justify the trial court in this case in relying upon them as authorities.

In the case of Maloney vs. King (Mont.), 76 Pac. 937, 940, the Court issued a preliminary injunction restraining defendants from extracting ore from a certain vein. Defendants appealed and the order was affirmed. Thereupon, defendants dismissed their cross-action and brought a new action in trespass against plaintiff and sought an injunction. This was denied, and defendants asked the appellate court for an order restraining plaintiff from removing ore in the second (trespass) suit pending appeal, which was denied. Then defendants dismissed the second suit and brought a third action in trespass and asked for an injunction, which was denied. It appears that defendants brought nine suits in all against plaintiff, all arising out of the conflicting ownership of the ore in said vein.

Plaintiffs in the original suit finally moved to amend the original injunctive order, so as to restrain defendant from bringing any more suits. This motion was granted and the order was affirmed on appeal.

The Supreme Court, after reciting the facts, set forth the procedure that should have been followed by the defendants in the following unmistakable language:

"The practice pursued by defendants in this regard cannot be countenanced or approved of by this Court, for at least two reasons:

1. The object of defendants sought to be accomplished by these two suits was undoubtedly to obtain a reciprocal or mutual injunction. They, being enjoined from working the disputed ground, desired that the plaintiffs should also be enjoined, so that the premises should remain in *statu quo* pending the litigation. However desirable such result would seem to be, it could have been attained in the original suit by petition on part of defendants setting forth the facts and the reasons for such relief. Upon a hearing, if the Court concluded that a proper showing had been made, it would undoubtedly have granted the relief sought."

The concluding paragraph of the opinion, which counsel for defendant claim is applicable to their theory, is merely a recital of the power and the duty of the trial court in such cases to grant injunctive relief to both parties on proper application. If an injunction first obtained against defendant also operated to restrain plaintiff, what need was there for the defendants to have petitioned for a reciprocal or mutual injunction?

Counsel for defendant, on pp. 21, 22 of their brief, quote and misquote from the opinion in the case of Anaconda Co. v. Pilot Butte Co. (Mont.), 153 Pac. 1006, and assume to extract therefrom some authority to support their contention that plaintiff is

equally bound by an order of injunction issued against defendant. We absolve counsel from any intent to misquote, since, in a measure, they state the substance, but, in order to place the matter clearly before the Court we will state the facts in the case and quote at some length. Plaintiff sought to quiet title to its Emily vein, which passed on its dip beneath the surface of defendant's claim below the 1800 foot level, and prayed for an order restraining defendant. Defendant claimed that its vein united with the Emily vein below the 1800 foot level and that its location was prior in point of time, and sought a cross-injunction against plaintiff. The trial court issued an injunction against defendant and also partially restrained plaintiff. Concerning the restraint of plaintiff, the opinion of the Supreme Court says:

> "The order also contains the following:
>
> " 'Furthermore, the plaintiff is hereby required to maintain *pendente lite* the present status as to the said Emily vein below the 1,800 foot level of the said Badger quartz lode claim, wherever the same may be found on its dip within the surface lines of the Pilot lode claim extended vertically downward, which said Pilot lode claim is more fully described in the answer of defendant. *Except as hereinbefore otherwise provided, the application of the defendant for a temporary injunction is refused.*' "

Defendant took an appeal from the order enjoining it from mining on the Emily vein, and a separate appeal from the order quoted above restraining

plaintiff from mining on the same vein below the 1800 foot level. Evidently, the second appeal was taken by defendant because the order restraining plaintiff was not sufficiently specific to satisfy defendant, for the opinion of the Supreme Court says:

> "While the order does not specifically so declare, it in legal effect grants a reciprocal injunction restraining both parties from conducting mining operations upon the Emily vein within the Pilot claim below the 1,800 foot level. The portion of the order quoted perhaps does not express the Court's purpose in the most appropriate terms. It nevertheless enjoins upon the plaintiff the duty to preserve the Emily vein in its present condition until the rights of the parties may be finally determined. So far, therefore, as it relates to the vein wherever found within the Pilot claim, the plaintiff is effectively restrained from conducting any mining operations upon it. Hence the defendant has no cause to complain of it. If the plaintiff should disregard it and proceed to mine upon and extract ore from the vein at any point within the plane of the south boundary of the Pilot ground, the Court would, upon proper showing, subject it to punishment for contempt, and thus preserve the vein until it can be determined who is the owner of it."

From these quotations, defendant's counsel derive the conclusion that "The defendant's injunction was refused," notwithstanding the plain statement in the order quoted above that "*except as hereinbefore*

otherwise provided, the application of the defendant for a temporary injunction is refused." In other words, defendant's application for an injunction against plaintiff was granted in part.

Clearly, the plaintiff was not itself restrained by the fact that it obtained an injunction against defendant, but by an express order which was made in pursuance of the cross-application of defendant.

Counsel for defendant appear to assume that the statement of the Supreme Court that, "the order, in legal effect, grants a reciprocal injunction restraining both parties," should be interpreted to mean that plaintiff was bound by its own injunction. That the Supreme Court of Montana does not attach such meaning to the words "reciprocal injunction" is shown by its use of the same phrase in the earlier case of Maloney v. King (Mont.), 76 Pac. 940, where a mine owner, who had been enjoined, thereafter instituted new suits and sought without success, to enjoin plaintiff. Of this situation the Supreme Court says:

> "The practice pursued by defendants in this regard cannot be countenanced or approved of by this Court, for at least two reasons:
>
> "1. The object of defendants sought to be accomplished by these two suits was undoubtedly to obtain a reciprocal or mutual injunction. They, being enjoined from working the disputed ground, desired that the plaintiffs should also be enjoined, so that the premises should remain in *statu quo* pending the litigation. *However desirable such result would seem to be,*

it could have been attained in the original suit by petition on part of defendants setting forth the facts and the reasons for such relief."

The case of Anaconda Co. v. Pilot Butte Co., therefore, not only fails to support defendant's theory, but is authority for the contention of plaintiff in this case; namely, that the remedy of defendant is for injunctive relief against plaintiff upon the terms imposed by the trial court.

On motion to dissolve the injunction in this case, counsel for plaintiff cited the case of Johnson v. Hall (Ga.), 9 S. E. 783, 784, as authority for the rule that the remedy of defendant was to apply for a cross-injunction, and Judge Van Fleet, in his memorandum opinion, referred to the case as authority for his decision. Counsel for defendant quote from the opinion, every line of which quotation is contrary to their contention. Plaintiff in that case brought suit for trespass and applied for an injunction to restrain defendants from cutting turpentine trees. After defendants had been enjoined, plaintiff entered upon the land and commenced to cut trees; whereupon defendants filed a cross-petition alleging title to the land and praying for an order restraining plaintiff. After a hearing, the Court enjoined plaintiff, but without requiring a bond of defendants, as had been done in the case of plaintiff when the injunction was issued against defendants. Plaintiff appealed from the order, which was affirmed, with the condition that defendant indemnify plaintiff, in the following language:

"The Court committed no error in the ruling complained of. It appears from the record in this case that both of these parties are *bona fide* claimants to this lot of land. When Hall & Bro. were enjoined from trespassing thereon, upon the application of Johnson, Johnson had no right to commit the very act which Hall & Bro. had been enjoined from committing. Where both parties in good faith claim title to the same tract of land, and one of them is enjoined from entering or trespassing thereon upon the application of the other, the object of the injunction is to preserve the land *in statu quo* until the title is settled by the proper proceedings. The plaintiff has no more right to disturb the *statu quo* than the defendants had; and it follows, as a matter of course, that, when the plaintiff undertook to commit the same acts that the defendants had been enjoined from committing, the Court should have restrained him also, it appearing that both parties *bona fide* claimed the land. (I High, Inj., sec. 679)."

Notwithstanding the straightforward reasoning of this opinion and its manifest righteousness, counsel for defendant weakly seek to impeach it by saying that it is not supported by High on Injunctions, who is cited by the case as authority.

Furthermore, counsel suggest that the order of the Supreme Court requiring a bond from defendants as a condition of the maintenance of the cross-injunction against plaintiff must have been predicated upon some State statute (p. 21 of defendant's brief).

Counsel must be hard pressed to interject such an unwarranted assertion. The opinion of the Supreme Court of Georgia gives no intimation of such statute, but bases the requirement of a bond upon plain, everyday equity. It says:

> "But we think that the Court should have placed both parties upon equal terms, and therefore should have required Hall & Bros. to give a similar bond to the one required of Johnson in the first injunction, and we therefore direct that the Court below require Hall & Bro. to give such bond, allowing them such reasonable time as he may think proper in which to give the same, and, if they fail to comply with this order, that he dissolve the injunction as to Johnson. Judgment affirmed, with direction."

If an injunction issued against one party also operates to bind the other party, then the whole subject of cross, counter or reciprocal injunctions is meaningless, and the Courts have been performing idle acts in issuing such injunctions.

DEFENDANT HAS A PLAIN, SPEEDY AND EFFECTIVE REMEDY AVAILABLE WHICH IT REFUSES TO ACCEPT.

Defendant's entire argument running throughout its brief is based upon the erroneous assumption that defendant has no remedy, and because of the order of the Court below it must sit by helplessly while plaintiff is mining in the territory in dispute.

The motion to dissolve the injunction which defendant made in the court below was not designed to

preserve the *status quo,* which defendant contends should be the prime object in such equitable proceedings. If the motion had been granted, it would have thrown the doors wide open and defendant could have resumed operations which was doubtless the chief motive actuating defendant in urging the motion, rather than any serious claims to the ore bodies which plaintiff was engaged in mining. As already noted defendant's defense at the hearing on the preliminary injunction was the Uren hypothetical easterly vein alleged to apex in defendant's ground, which plaintiff's subsequent developments have shown to be purely imaginary as far as any relation to the 16 to 1 vein is concerned (Tr. 105).

Even assuming this Uren theory to be a fact, this imaginary vein does not include the ore bodies plaintiff is mining. Surely, counsel will not contend that defendant has a right to mine uphill and follow up past where they claimed the hypothetical right angle turn in this vein existed. Defendant has introduced no other theory of defense, and therefore comes before this Court without any substantial claim to the ore bodies plaintiff is mining except the time-worn assertion of surface ownership.

The Court below fully recognized this situation, and also recognized that plaintiff had been acting in entire good faith in the endeavor to secure protection against loss resulting from its cessation of mining operations. It therefore denied the motion and granted the defendant the privilege of obtaining a cross or reciprocal injunction restraining plaintiff

from mining upon furnishing a bond of similar character and amount to that already furnished by plaintiff. What could be more equitable? By complying with the terms of this order, defendant would have definitely and completely preserved the *status quo* that it has throughout the entire length of its brief so strongly urged should be preserved. But no; defendant insists that the *status quo* be utterly destroyed by permitting it to mine also. Where are these urgent appeals in behalf of the *status quo* and the authorities defendant has piled up to sustain this highly equitable principle? We respectfully submit that defendant has shown by its own conduct that it is not in reality interested in preserving the *status quo,* but that its main desire is to resume mining operations beneath surface that it does not even own.

But defendant insists that, to compel it to furnish a bond similar in every way to the bond already furnished by plaintiff, as a condition for restraining plaintiff from mining, might result in great hardship. On page 9 of its brief, it presents a supposititious case, where an owner of a mining claim has gone abroad and left his mine in charge of a number of miners, plaintiff might enjoin them and "these poor employees" would not be able to protect the defendant's interests. The answer to this is that if a mine owner is foolish enough to go abroad and leave his business in incompetent hands, he must suffer the consequences that all equally improvident business men under like circumstances would suffer. He would be clearly guilty of gross neglect. But that is not the situation here.

Again, opposing counsel assume a case where a defendant "without any notice whatsoever" might be required to furnish a bond forthwith, and as he had no notice could give no bond. What bearing this has on the case at bar, it is difficult to perceive. Plaintiff here stopped work for over two months, and before resuming work gave defendant notice of its intention to resume work, after endeavoring to get defendant to furnish a bond. If a plaintiff acted in the inequitable manner assumed, any Court would undoubtedly protect the defendant and require notice to be given. But that situation is not involved here.

Opposing counsel then assume that defendant might have no means or credit and be thus unable to supply a bond. The identical argument applies to the plaintiff and all parties who come before a court for injunctive or other relief. If they have neither the means nor the credit to assume the legitimate burdens imposed by the Court as a condition for obtaining such relief, they naturally do not get the relief. If such excuses were available, no bonds would ever be furnished. If plaintiff had been unable to obtain the $30,000 bond, which the Court required and which defendant insisted should be furnished, then it would not have been able to restrain defendant from working. There is nothing in the record before this Court to indicate that defendant cannot furnish such a bond. If defendant should expend the energy and money which has been necessary for it to prosecute this appeal, it is not assuming too much to venture the assertion that it could easily fur-

nish the bond required by the lower court as a condition for restraining defendant from mining.

But defendant says plaintiff is the primary actor and forced this situation by bringing this suit. Not so; defendant brought this situation on itself by trespassing on plaintiff's 16 to 1 vein, and forced the plaintiff to take immediate steps to protect its rights. The plaintiff did not seek this litigation, but was forced into it by prior acts of defendant, which were the prime contributing cause. To pursue defendant's argument a little further, it leads to this inevitable result: a party may commit a clear trespass on another's vein and if the real owner seeks to prevent and enjoins this unlawful mining and secures an injunction, the defendant is protected against possible damage by the bond furnished, but the injured party must sit by with hands tied, mutually enjoined by his own injunction, as defendant argues, and the trespasser does not have to give any bond to indemnify the real owner against the actual damage he is suffering. We venture to assert that no Court is going to be influenced by such sophistry.

THE DISSOLUTION OF AN INTERLOCUTORY INJUNCTION RESTS IN THE SOUND JUDICIAL DISCRETION OF THE COURT OF ORIGINAL JURISDICTION.

This proposition is so elementary that little space will be devoted to its discussion. The following authorities speak for themselves.

Appeal from an order refusing to dissolve an interlocutory injunction:

"The granting or dissolution of an interlocutory injunction rests in the sound judicial discretion of the Court of original jurisdiction, and when that Court has not departed from the rules and principles of equity established for its guidance, its orders in this regard may not be reversed by the appellate court without clear proof that it abused its discretion. It is to the discretion of the trial court, not to that of the appellate court, that the law has intrusted the power to grant or dissolve such an injunction, and the question here is: Does the proof clearly establish an abuse of that discretion by the court below? American Grain Separator Co. v. Twin City Separator Co., 202 Fed. 202, 206, 120 C. C. A. 644, 648, and cases there cited."

Magruder v. Belle Fourche etc. Assn., 219 Fed. 72, 82.

In such cases the appellate court can no more determine the weight of conflicting affidavits than it can settle conflicts in the evidence on appeal from final judgments.

Home E. L. & P. Co. v. Globe T. P. Co. (Ind.), 45 N. E. 1108, 1110.

"The discretion exercised by Courts in acting upon motions for injunctions is very great, and each case must be decided upon the facts and circumstances presented. . . . "

Edison Elec. Light Co. v. Buckeye Elec. Co., 64 Fed. 225, 228.

It ill befits defendant to talk of equitable principles when it is in a court of equity refusing to do what is plain equity. If defendant has been injured, it has only itself to blame, for its remedy has been open to it from the beginning, and the court below in the order appealed from had, even without any request from defendant, held this remedy out to it. It would not seem that defendant should object to this equitable burden which is imposed in all fairness upon both parties alike for protection against similar damage occasioned each, and which burden the plaintiff has already cheerfully assumed. We ask that the order appealed from be affirmed.

Respectfully submitted,

WM. E. COLBY,

GRANT H. SMITH,

Attorneys for Plaintiff.

No. 2927

United States
Circuit Court of Appeals
For the Ninth Circuit.

ALASKA PACKERS ASSOCIATION, a Corporation,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Territory of Alaska, Third Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

In the District Court for the Territory of Alaska, Third Division.

CRIM.—No. 437.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,

vs.

ALASKA PACKERS ASSOCIATION, a Corporation,
Defendant and Plaintiff in Error.

Names and Addresses of Attorneys of Record.

WILLIAM N. SPENCE, United States Attorney, and His Assistant, WILLIAM A. MUNLEY, Attorneys for Plaintiff and Defendant in Error,
Valdez, Alaska.

DONOHOE and DIMOND, Attorneys for Defendant and Plaintiff in Error,
Valdez, Alaska. [3*]

In the District Court for the Territory of Alaska, Third Division.

No. 437.

UNITED STATES OF AMERICA

vs.

ALASKA PACKERS ASSOCIATION, a Corporation.

*Page-number appearing at foot of page of original certified Transcript of Record.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare, authenticate and certify for filing in the office of the clerk of the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, upon the Writ of Error heretofore issued in the above-entitled cause, the following pleadings, records and papers on file in said cause, to wit:

1. This Praecipe.
2. Indictment.
3. Defendant's Motion to Strike Said Indictment.
4. Minute Order of the Court Denying Defendant's Motion.
5. Defendant's Demurrer to the Indictment.
6. Minute Order of the Court Overruling Defendant's Demurrer.
7. All Minute Order in Any Manner Connected With the Trial of Said Cause.
8. Verdict of the Jury.
9. Defendant's Motion in Arrest of Judgment.
10. Minute Order Denying Defendant's Motion in Arrest of Judgment.
11. Defendant's Motion for a New Trial. [4]
12. Minute Order Overruling Defendant's Motion for a New Trial.
13. Judgment and Sentence.
14. Order Extending Time to Serve and File Proposed Bill of Exceptions.

15. Defendant's Bill of Exceptions Including Order Allowing and Settling Said Bill of Exceptions.
16. Assignment of Errors.
17. Petition for Writ of Error.
18. Order Allowing Writ of Error.
19. Writ of Error.
20. Supersedeas Bond.
21. Citation upon Writ of Error Including Acknowledgment of Service on Writ of Error.
22. Order Extending Time in Which to File Record in the United States Circuit Court of Appeals, Ninth Circuit, Until February 5, 1917.

Dated at Valdez, Alaska, this 7th day of December, 1916.

DONOHOE & DIMOND,

Attorneys for Defendant and Plaintiff in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 7, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [5]

In the District Court for the Territory of Alaska, Division Number Three.

No. 437.

UNITED STATES OF AMERICA

vs.

ALASKA PACKERS ASSOCIATION, a Corporation,

Indictment.

The Alaska Packers Association, a corporation, is accused by the grand jury of the Territory of Alaska, Division Number Three, by this indictment, of the crime of Wanton Waste of Salmon, committed as follows:

The said Alaska Packers Association, on the thirtieth day of July, nineteen hundred and thirteen, in the Territory and Division aforesaid, being then and there a corporation organized and existing under the laws of the State of California, unlawfully and wantonly did waste and destroy a large number of salmon, which salmon then and there had been taken and caught in the waters of Alaska, to wit, at a point in the waters of Cook Inlet near the western shore of said inlet between the mouth of the Kustatan River, and the West Foreland in said Territory and Division, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Dated at Seward, in the Territory and Division aforesaid, the fourteenth day of October, nineteen hundred and fourteen.

WILLIAM N. SPENCE,
District Attorney.
By WILLIAM H. WHITTLESEY,
Assistant District Attorney.
WILLIAM H. WHITTLESEY,
Assistant District Attorney.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Oct. 15, 1914. Arthur Lang, Clerk. By K. L. Monahan, Deputy. [6]

No. 437. District Court, Territory of Alaska, Third Division. The United States of America vs. Alaska Packers Association, a Corporation. Indictment—Wanton Waste of Salmon. A True Bill. C. C. Harman, Foreman. Witnesses Before Grand Jury: William J. Hunter; Hayward March. [7]

In the District Court for the Territory of Alaska, Division Number Three.

No. 437.

UNITED STATES OF AMERICA

vs.

ALASKA PACKERS ASSOCIATION, a Corporation.

Motion to Strike Indictment.

Comes now the above-named defendant by its attorneys, Messrs. Donohoe & Dimond, and moves this Honorable Court for an order herein setting aside and quashing the said Indictment on the following grounds, to wit:

1. That the said Indictment was not found, endorsed and presented as described by Chapter 6 of Title XV, of the Code of Criminal Procedure, Compiled Laws of the Territory of Alaska, in that the said Indictment fails to disclose that it was found by a duly organized grand jury or that it was pre-

sented by their foreman in their presence in open court:

2. That said Indictment does not substantially, or at all, conform to the requirements of Chapter 7, of Title XV, of the Code of Criminal Procedure, Compiled Laws of the Territory of Alaska, in that,

(a) The acts and omissions charged therein as the crime are not clearly and distinctly set forth in ordinary and concise language, so that a person of common understanding may know what is intended.

(b) The acts and omissions charged as the crime are not set forth in such a manner as to enable a person of common understanding to know what is intended. [8]

(c) The acts and omissions charged as the crime are not set forth with such a degree of certainty as to enable the Court to pronounce judgment upon a conviction according to the right of the case.

(d) The defects and imperfections in said Indictment are such that they actually prejudice the substantial rights of the defendant upon the merits.

3. That the facts stated in said Indictment do not constitute a crime.

4. That said Indictment is not direct and certain as regards the crime charged.

5. That said Indictment is not direct or certain as regards the particular circumstances of the crime charged.

6. That said Indictment charges more than one crime.

7. That said Indictment fails to charge but one crime, and in but one form only.

8. That said Indictment fails to sufficiently show that the crime charged was committed in the jurisdiction of said Court.

9. That said Indictment fails to show that the crime charged was committed within the time limited by law for the commencement of an action therefor.

10. That said Indictment is defective because of ambiguity, duplicity and multifariousness, and because the same is involved, and wholly lacks that certainty of averment requisite to inform the defendant of the nature of the facts, or the character of the evidence, it will be required to meet upon the trial of the specific charges made.

DONOHOE & DIMOND,
Attorneys for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 2, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [9]

In the District Court for the Territory of Alaska, Third Division.

No. 437—CRIMINAL.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALASKA PACKERS ASSOCIATION, a Corporation,
Defendant.

Order on Motion to Strike Indictment.

Now on this day, the motion to strike the indictment in the above-entitled cause coming on to be heard, the United States District Attorney Wm. N. Spence and his assistant, Wm. A. Munly, appearing for the Government; the defendant not being present but entering its appearance by its attorneys, Donohoe & Dimond, and after argument had and the motion being fully considered by the Court,—

IT IS ORDERED that said motion be and the same is hereby denied.

February, 1915, Term, April 2, 20th Court Day, Friday.

* * * * * * * * *

Entered Court Journal No. 9, page 43. **[10]**

In the District Court for the Territory of Alaska, Division Number Three.

No. 437.

UNITED STATES OF AMERICA

vs.

ALASKA PACKERS ASSOCIATION, a Corporation.

Demurrer to Indictment.

Comes now, the Alaska Packers Association, a corporation, the defendant herein, by its attorneys, Messrs. Donohoe & Dimond, and having heard read the Indictment herein, demurs thereto upon the grounds, and for the reasons as follows, to wit:

That it appears from the face of the Indictment:

1. That the said Indictment does not substantially conform to the requirements of Chapter 7, of Title XV, of the Code of Criminal Procedure, Compiled Laws of the Territory of Alaska, in that,

(a) The acts and omissions charged as the crime are not clearly and distinctly set forth in ordinary and concise language without repetition so as to enable a person of common understanding to know what is intended.

(b) That the acts and omissions charged are not set forth in such a manner as to enable a person of common understanding to know what is intended.

(c) That the acts and omissions charged as the crime are not stated with such a degree of certainty as to enable the Court to pronounce judgment upon a conviction according to the right of the case.

(d) That the defects and imperfections of said Indictment [11] are such that they actually prejudice the substantial rights of the defendant upon the merits.

2. That said Indictment does not charge or allege facts against said defendant sufficient to constitute any offense or the violation of any law by the defendant.

3. That the facts stated in said Indictment do not constitute a crime.

4. That more than one crime is charged in the Indictment without stating it in the manner prescribed by statute.

5. Said Indictment is not direct and certain as regards the crime charged.

6. That said Indictment is not direct and certain as regards the particular circumstances of the crime charged.

7. That the said Indictment fails to sufficiently show that the crime charged was committed within the jurisdiction of the said Court.

8. That said Indictment fails to show that the crime charged was committed within the time limited by law for the commencement of an action.

9. That said Indictment is defective because of ambiguity, duplicity, multifariousness, and because the same is involved and lacks that certainty of averment requisite in order to inform the defendant of the nature of the facts, or the character of the evidence which it will be required to meet upon the trial of the specific charge attempted to be made.

WHEREFORE, defendant prays judgment that by the Court it be discharged and dismissed of the said Indictment.

DONOHOE & DIMOND,
Attorneys for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 2, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [12]

In the District Court for the Territory of Alaska, Third Division.

No. 437—CRIMINAL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACKERS ASSOCIATION, a Corporation,

Defendant.

Minute Order on Demurrer to Indictment.

The demurrer in the above-entitled cause came on to be heard this day; Wm. N. Spence, United States Attorney, and his assistant, Wm. A. Munly, appearing for the Government; and the defendant not being present in person but entering its appearance by its attorneys, Donohoe & Dimond, and after argument had and the demurrer being fully considered by the Court,—

IT IS ORDERED that said demurrer be and the same is hereby overruled.

February, 1915 Term, April 2, 20th Court Day, Friday.

* * * * * * * * *

Entered Court Journal No. 9, page 44. [13]

In the District Court for the Territory of Alaska, Third Division.

IN THE MATTER OF THE REPORT OF THE UNITED STATES GRAND JURY.

Order Re Further Deliberations of Grand Jury, etc.

NUNC PRO TUNC ORDER.

And now comes into court the United States grand jury, heretofore empaneled and sworn, in charge of their sworn bailiff, and being called and each answering to his name, present, thru and by their foreman in open court, secret indictments in criminal causes Nos. 437, 438, 439, 440, 441, 442, 443, 444, 445, 446 and 447; said indictments endorsed "A True Bill," and the same were thereupon filed in open court with the clerk of said court.

And representing to the Court that they have other and further matters for consideration, the grand jury retire in charge of their sworn bailiff for further deliberation. It is ordered that this proceeding be entered in the court journal *nunc pro tunc* as of date October 15, 1914.

Dated at Valdez, Alaska, this 2d day of April, 1915.

FRED M. BROWN,
District Judge.

[Endorsed]: Entered Court Journal No. 9, page 45. Filed in the District Court, Territory of Alaska, Third Division. Apr. 2, 1916. Arthur Lang, Clerk.
[14]

In the District Court for the Territory of Alaska, Third Division.

CRIMINAL—No. 437.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACKERS ASSOCIATION, a Corporation,

Defendant.

Arraignment.

Now on this day came the Asst. U. S. Attorney, Wm. A. Munley; and the defendant not being present but entering its appearance by its attorneys, Messrs. Donohoe & Dimond, waived the reading of the indictments and time to plead.

* * * * * * * * *

Entered Court Journal No. 9, page No. 42.

February, 1915 Term, April 2, 20th Court Day, Friday. [15]

In the District Court for the Territory of Alaska, Third Division.

CRIMINAL—No. 437.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACKERS ASSOCIATION,

Defendant.

Plea.

Now on this day came the U. S. Attorney, Wm. N. Spence, and his Asst., Wm. A. Munly, appearing for the Government; the defendant not being present but being represented by its counsel, Messrs. Donohoe & Dimond, and the defendant having been duly arraigned, was asked by the court if it is guilty or not guilty of the crime charged against it in the indictment, namely, that of "Wanton Waste of Salmon," in cause No. 437, to which defendant, thru its counsel, says that it is not guilty and therefore puts itself upon the country, and the U. S. Atty., for and on behalf of the Government, doth the same, and these causes are set for trial on the first day of the fall term held in the Third Division.

* * * * * * * * *

February, 1915 Term—April 2, 1915—20th Court Day, Friday.

Entered Court Journal No. 9, page No. 46. **[16]**

In the District Court for the Territory of Alaska, Third Division.

No. 437.

UNITED STATES OF AMERICA,

vs.

ALASKA PACKERS ASSOCIATION, a Corporation,

Defendant.

Verdict.

We, the jury, duly empaneled and sworn in the above-entitled action, do find the defendant Guilty as charged in the indictment.

Dated Valdez, September 18, 1916.

H. P. KING,
Foreman.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Sep. 18, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 10, page No. 329. **[17]**

In the District Court for the Territory of Alaska, Third Division.

No. 437.

UNITED STATES OF AMERICA

vs.

ALASKA PACKERS ASSOCIATION, a Corporation.

Motion in Arrest of Judgment.

Comes now Alaska Packers Association, a corporation, the defendant above-named, by its attorneys, Donohoe & Dimond, and moves and prays the above-named court that no judgment be rendered on the verdict of Guilty heretofore rendered by the jury herein and returned into this court on the 18th day of September, 1916, for the following reason, to wit:

I.

That the facts stated in the indictment found in

this cause and now on file herein, and upon which indictment the prosecution in this case has been had and the defendant found guilty by the verdict of a jury, as aforesaid, do not constitute a crime.

Dated at Valdez, Alaska, October 13, 1916.

DONOHOE & DIMOND,
Attorneys for Defendant.

Service of the foregoing motion in arrest of judgment, by receipt of copy thereof, acknowledged at Valdez, Alaska, this 13th day of October, 1916.

WILLIAM N. SPENCE,
United States Attorney.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Oct. 13, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. **[18]**

In the District Court for the Territory of Alaska, Third Division.

No. 437—CRIMINAL.

UNITED STATES OF AMERICA

vs.

ALASKA PACKERS ASSOCIATION, a Corporation.

Minute Order Denying Motion for Arrest of Judgment.

Now on this day this motion came on to be heard, Donohoe & Dimond appearing as attorneys for defendant, and W. N. Spence, United States Attorney, appearing on behalf of the Government, and after

argument had, and the Court being fully advised in the premises,—

IT IS ORDERED that this motion be, and the same is hereby denied, to which order of the Court defendant excepts, and exception is allowed.

September, 1916 Term—October 14th—30th Court Day, Saturday.

Entered Court Journal No. 10, page No. 437. **[19]**

In the District Court for the Territory of Alaska, Third Division.

No. 437.

UNITED STATES OF AMERICA

vs.

ALASKA PACKERS ASSOCIATION, a Corporation.

Motion for a New Trial.

Comes now the above-named defendant and moves this Honorable Court for an order setting aside the verdict of the jury herein found made and entered on the 18th day of September, 1916, finding the defendant guilty of the crime charged in the indictment herein, for each and all of the following causes materially affecting the substantial rights of the said defendant:

I.

Insufficiency of the evidence to justify the said verdict.

II.

That the said verdict is against the law.

III.

Error in law occurring at the trial and excepted to by the defendant, as follows:

(a) The Court erred in permitting plaintiff to introduce evidence tending to establish that a large number of salmon were wasted or destroyed unlawfully and wantonly by the defendant on more than one date, thus permitting the jury to consider evidence of crimes alleged to have been committed, other than the crime charged in the indictment.

(b) The Court erred in denying defendant's motion, made at the time of the introduction of the first evidence by the Government tending to establish the unlawful and wanton waste and [20] destruction of a large number of salmon by the defendant, that the plaintiff at that time be compelled to elect a date on which it should attempt to prove the commission of the crime charged in the indictment.

(c) The Court erred in overruling the defendant's objection to evidence tending to establish the commission of the crime alleged on any date other than the 26th day of July, 1913, that being the date elected by law as the date of the crime charged in the indictment upon the plaintiff's refusal to elect a date, as the evidence of the Government's witnesses first given tended to show a waste and destruction of a large number of salmon on the 26th day of July, 1913.

(d) The Court erred in requiring the plaintiff to elect a date as the date on which the alleged crime was committed at the close of the plaintiff's testimony, as the 26th day of July, 1913, had already been

elected by law as such date; and the Court further erred in permitting the plaintiff at said time to elect as the date of the commission of such alleged crime the 28th day of July, 1913, for the same reason.

(e) The Court erred in permitting the Government to introduce, over the objection of the defendant, evidence tending to establish the wanton and unlawful waste or destruction by the defendant of a large number of salmon on any date subsequent to the 26th day of July, 1913, as evidence of subsequent collateral crimes or alleged crimes is not in any manner relevant as proof of the crime charged in an indictment.

(f) The Court erred in permitting the Government to introduce, over the objection of the defendant, evidence tending to establish the wanton and unlawful waste or destruction of a large number of salmon by the defendant on any date subsequent to the 28th day of July, 1916, the date elected by the plaintiff as the date on which the crime charged was committed, on the ground that evidence of subsequent collateral crimes or alleged crimes is not in any manner [21] relevant or competent as proof of the crime charged in an indictment.

(g) The Court erred in denying the defendant's motion for an instructed verdict of not guilty at the close of the plaintiff's testimony on each and all of the grounds set forth therein.

(h) The Court erred in denying defendant's motion for an instructed verdict of not guilty at the close of the whole case, on each and all of the grounds set forth therein.

(i) The Court erred in giving to the jury its Instruction No. 2, the giving of which was duly excepted to by the defendant in the presence of the jury before it retired, on the ground that the word wantonly was not properly defined in that the Court did not include in the definition the elements of perversity, mischief and turpitude, as was more fully set forth in the defendant's said exception taken as aforesaid.

(j) The Court erred in giving to the jury its Instruction B, in the form given, the said instruction being Instruction No. 9 offered by the defendant and requested to be given to the jury, on the ground that as given by the Court it was given subject to the qualifications and provisions of the Court's Instruction No. 8, given to the jury, the giving of said instruction being duly excepted to by the defendant.

(k) The Court erred in giving to the jury its Instruction C, in the form given, the said instruction being Instruction No. 10 offered by the defendant and requested to be given to the jury, on the ground that as given by the Court it was given subject to the qualifications and provisions of the Instruction No. 8 given by the Court to the jury, the giving of which was duly excepted to by the defendant.

(l) The Court erred in giving to the jury its Instruction No. 5, duly excepted to by the defendant in the presence of the jury and before it retired, on the ground that it admitted to the consideration of the jury evidence tending to establish collateral crimes, some of which were subsequent in date to the date of

the [22] crime charged in the indictment, and subsequent to the 28th day of July, 1913, the date elected by the Government as that of the commission of the crime charged, and on the ground that the general tenor of the second or middle paragraph of said instruction, and particularly the following quoted phrase: "This testimony was admitted only as showing a long course of conduct," etc., was such as would naturally and necessarily prejudice the substantial rights of the defendant in the minds of the jury, and that the jury would necessarily take therefrom an indication that the Court believed the defendant guilty.

(m) The Court erred in giving to the jury its Instruction No. 7, in the form given, in that it contained the following quoted provision:

> "The last two paragraphs are to be considered by you in connection with the following statement of the law concerning contracts for the catching or trapping of salmon, to wit:"

The statement of the law referred to in the above-quoted portion of Court's Instruction No. 7 being Court's Instruction No. 8, which last-mentioned instruction is contrary to the law and is against the law. This exception was duly taken by the defendant in the presence of the jury and before it retired.

(n) The Court erred in giving to the jury its Instruction No. 8, the giving of which was duly excepted to by the defendant in the presence of the jury and before it retired, on the grounds then and there fully and completely stated and now a part of the record in this case, reference being made to said record of said statement for a more particular

specification of such grounds therefor.

(o) The Court erred in refusing to give to the jury the defendant's Instructions Nos. 2, 3, 4, 5, 6 and 7, presented to the Court by the defendant and requested by the defendant to be given to the jury, which said refusal was duly excepted to by the defendant [23] in the presence of the jury and before it retired.

(p) The Court erred in refusing to give to the jury the defendant's Instructions Nos. 9 and 10, in the form presented by the defendant and requested to be given to the jury, the Court having given such instructions to the jury as its Instructions B and C, respectively, but both said instructions as given were given subject to the qualfications mentioned in the Court's Instruction No. 8, the giving of which was also duly excepted to by the defendant as being contrary to the law and against the law.

(q) The Court erred in refusing to give to the jury defendant's Instructions Nos. 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28 and 29, presented to the Court by the defendant and requested by the defendant to be given to the jury as its instructions in this cause, to which refusal the defendant duly excepted in the presence of the jury and before it retired.

(r) The Court erred in overruling defendant's motion, made at the close of the plaintiff's testimony, that the Court strike from the record and take from the consideration of the jury all evidence tending in any manner to establish an unlawful and wanton waste and destruction of a large number of salmon

by the defendant on any date other than the 28th day of July, 1916, that being the date elected by the plaintiff as the date on which the crime charged in the indictment was committed, on the ground that all such evidence, which the Court so refused to strike, was incompetent and irrelevant to prove the commission of the crime alleged to have been committed on July 28, 1913, and was prejudicial to the substantial rights of the defendant.

(s) The Court erred in overruling the defendant's motion, made at the close of the plaintiff's testimony, that the Court strike from the record and take from the consideration of the jury all evidence tending in any manner to establish an unlawful and wanton waste and destruction of salmon on any date subsequent to the 28th day of July, 1913, the date elected by the plaintiff as the [24] date the commission of the crime charged, on the ground that evidence tending to establish collateral crimes subsequent in date to the crime charged is incompetent and irrelevant, and was prejudicial to the substantial rights of the defendant.

DONOHOE & DIMOND,
Attorneys for the Defendant.

Service of copy of the foregoing motion for a new trial admitted at Valdez, Alaska, this 19th day of September, 1916.

WILLIAM A. MUNLY,
Asst. United States Attorney.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Sep. 19, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [25]

In the District Court for the Territory of Alaska. Third Division.

No. 437—CRIMINAL.

UNITED STATES OF AMERICA

vs.

ALASKA PACKERS ASSOCIATION, a Corporation,

Minute Order Denying Motion for New Trial.

Now on this day, this motion came on to be heard, Donohoe & Dimond, appearing as attorneys for defendant, and W. N. Spence, United States Attorney, appearing on behalf of the Government, and after argument had and the Court being fully advised in the premises,—

IT IS ORDERED that this motion be, and the same is hereby denied, to which order of the Court defendant excepts and exception is allowed.

* * * * * * * * *

September, 1916 Term—October 14th—30th Court Day, Saturday.

Entered Court Journal No. 10, page No. 437. **[26]**

In the District Court for the Territory of Alaska, Third Division.

No. 437.

UNITED STATES OF AMERICA

vs.

ALASKA PACKERS ASSOCIATION.

Judgment and Sentence.

And now on this day came the Assistant United States Attorney; also came the defendant herein, Alaska Packers Association, a corporation, by Donohoe & Dimond, its attorneys; and the defendant, Alaska Packers Association, a corporation, having on a prior day of this term been duly convicted, by verdict of a jury, of the crime charged against it in the indictment herein, namely, that of wanton waste of salmon;

It is now therefore the judgment and sentence of the Court that you, Alaska Packers Association, a corporation, pay a fine of two hundred ($200) dollars, said fine to include all costs.

Done in open court this fourteenth day of October, nineteen hundred and sixteen.

FRED M. BROWN,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Oct. 16, 1916. Arthur Lang, Clerk. By Chas. A. Hand, Deputy.

Entered Court Journal No. 10, page No. 438. [27]

In the District Court for the Territory of Alaska, Third Division.

No. 437—CRIMINAL.

UNITED STATES OF AMERICA

vs.

ALASKA PACKERS ASSOCIATION, a Corporation.

Minute Order Fixing Amount of Supersedeas Bond and Granting Sixty Days' Time in Which to File and Settle Bill of Exceptions.

Now on this day, on motion of Donohoe & Dimond, attorneys for defendant,—

IT IS ORDERED that the supersedeas bond in this cause be fixed at the sum of five hundred dollars ($500), and that the defendant have sixty days from this date in which to file and settle bill of exceptions.

* * * * * * * * * * *

September, 1916 term—October 16th–31st, Court day, Monday.

Entered Court Journal No. 10, page No. 440. [28]

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 7, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [29]

In the District Court for the Territory of Alaska, Third Division.

No. 437—CRIMINAL.

UNITED STATES OF AMERICA

vs.

ALASKA PACKERS ASSOCIATION, a Corporation,

Defendant.

Bill of Exceptions and Transcript of Evidence.

BE IT REMEMBERED, That the above-entitled cause came on duly and regularly to be heard on Saturday, the 16th day of September, 1916, before

the Honorable FRED M. BROWN, Judge of said court, and a jury:

The plaintiff herein being represented by Honorable WILLIAM A. MUNLY, Assistant United States Attorney:

The defendant herein being represented by its attorneys and counsel, Messrs. DONOHOE & DIMOND:

Opening statements were made to the Court and jury by Mr. Munly on behalf of the Government and by Mr. Dimond on behalf of the defendant.

WHEREUPON the following additional proceedings were had and done, to wit:

Mr. MUNLY.—It is admitted, is it not, that this defendant is a corporation, organized under the laws of the State of California and doing business in the Territory of Alaska?

Mr. DIMOND.—We make that admission, yes, sir.

The COURT.—The record will so show.

Monday, September 18, 1916.

MORNING SESSION.

Testimony of Hayward March, for the Government.

HAYWARD MARCH, a witness called and sworn in behalf of the Government, testified as follows:

Direct Examination.

(By Mr. MUNLY.)

Q. You may state your name.

A. Hayward March.

Q. Where do you live?

A. Kenai, Cook's Inlet, Alaska.

Q. How long have you lived there?

(Testimony of Hayward March.)

A. A little over eighteen years.

Q. What is your business, usually?

A. Fishing.

Q. Do you know Captain Williams, superintendent of the Alaska Packers Association?

A. Yes, sir.

Q. Did you know him in 1913? A. Yes, sir.

Q. Did you meet him at Kasiloff?

A. Yes, sir.

Q. About the latter part of April, 1913?

A. Yes, sir.

Q. State if you had a conversation there in regard to getting fish for him. A. Yes, sir.

Q. What was that conversation, what was it about? [31]

A. Me and Mr. Hunter went to Kasiloff on or about the 28th of April, if I remember right, about that time. We landed there in a small boat, called a sloop, landed on the beach—don't know what time of day it was. We went up on the wharf, me and Hunter and I met Captain Williams and he met me; I knowed him and he knowed me. He said, "Well, March, what can I do for you"? I said, "I came down to see about fishing—I understand you are going to buy fish and let out gear, and so on." He says, "What gear do you want—trap gear"? and I said, "Trap gear," and he said, "Make out your list of what gear you want and give it to the beach boss on the wharf, as he is the man that handles that gear." And I spoke about the fish and he said, "I will take all your fish and furnish scows, as we have

(Testimony of Hayward March.)

steamers and scows and the Alaska Packers Association can afford to pay you for what little fish you catch," as Captain Williams knew I wasn't going to catch a hundred thousand fish—

Mr. DIMOND.—We object to that.

The COURT.—Tell the conversation.

The WITNESS.—I got the gear, such as wire—

Mr. DONOHOE.—We object to that as not responsive to the question—the question was to state the conversation that took place between Captain Williams and this witness.

The WITNESS.—Mr. Williams told me he would furnish me the gear and take what fish I would catch—furnish me the scows, as he had steamers and the Alaska Packers Association could pay me for what little fish I would catch.

Q. State whether or not he said he would send a boat there for your fish.

Mr. DONOHOE.—We object to that as leading—the witness has already testified to the conversation.

Objection overruled—defendant allowed an exception. [32]

Q. State whether or not he said he would send a boat there for your fish. He said he had scows and boats, did he?

A. He had scows and steamers and he would take what little fish I would catch, as the Alaska Packers Association could afford to pay me.

Q. Now, tell us what gear you got.

A. We got guy wires, nails—

Q. How much guy wire?

(Testimony of Hayward March.)

A. Three coils, if I remember, of guy wire; we got nails, a quantity of nails, they were not weighed; they were given to me by the beach boss, the quantity I thought would do me at the time,—if I wanted any more I could send back to the cannery and get them; hammers and such things as we needed to start our trap with. We put them in the sloop and Mr. Williams had ordered one of his gas boats to tow us out to the river—

Q. What else did you get?

A. Nails—no webbing wire at that time, as he said he was busy at that time and would send it later on.

Q. Did you get it later on? A. Yes, sir.

Q. How much?

A. Eight coils of wire webbing.

Q. How many feet would that be?

A. Two hundred feet in a coil, I believe it was—it is over 150 feet—some call it 150 and some 200 in a coil.

Q. Eight coils? A. Eight coils.

Q. That is guy wire, the webbing wire—did you get anything else?

A. We have taken no webbing wire when we started from the cannery.

Q. Did you get anything else?

A. 400 feet of cotton web. [33]

Q. Nails?

A. Nails; 200 battens for the floor of the trap.

Q. What was that?

A. Battens for the floor of the trap, two by twos.

Q. Did you ever enquire the cost of web wire?

(Testimony of Hayward March.)

A. I have as to the cost of wire in Kenai—I have been told it would cost me $18 a roll.

Q. How many rolls did you get in this case?

A. Eight rolls.

Q. Do you know about how much the cost of the web would be,—I mean the cotton web?

A. No, I have no idea.

Q. How many feet of guy wire did you get?

A. I can't say how many feet—I had three coils; I don't know how many feet in a coil of guy wire.

Q. A hundred or two hundred?

A. Yes, there is quite a lot of wire in a coil of guy wire.

Q. How big is the guy wire?

A. It isn't very large.

Q. A quarter of an inch?

A. No, it is not that large, I don't believe.

Q. One-eighth? A. Probably.

Q. Pretty heavy wire, isn't it?

A. Yes, fairly heavy guy wire.

Q. You had several hundred feet of it?

A. Yes, sir.

Q. Did they furnish any other boat besides the scow?

A. Yes, they furnished me one more boat, a double-ender Columbia River boat.

Q. How big was the scow? [34]

A. A large fishing scow to keep stationary, a large fishing lighter; it would carry probably eight thousand fish. I saw the same scow this spring in Kuskatan with 1800 king salmon in it, the same scow I

(Testimony of Hayward March.)
had in 1913, and she was loaded this spring in Kuskatan with 1800 king salmon.

Q. Did you build the trap?

A. We got to Kuskatan about the second day of May.

Q. Point out where Kuskatan and Kasiloff are on this map.

A. I couldn't very well explain it on the map, on the chart.

Q. Here is Kasiloff and here is Kuskatan.

A. Yes, sir—and this is East Foreland and this West Foreland.

Q. And here is the cannery? A. Yes, sir.

Q. Did you construct a trap at Kuskatan?

A. Yes, sir.

Q. What kind of a trap was it?

A. It was what we call a mosquito trap—it is the traps we had in olden times in Kenai and Kasiloff.

Q. Look at that drawing there of a trap and say if that is the kind and description.

A. That is a model of the trap I had in Kuskatan.

Mr. MUNLY.—We ask that that model be introduced in evidence by the Government. It is merely for the purpose of illustration; we do not claim it is absolutely correct. The map is admitted in evidence as Plaintiff's Exhibit "A"; it is attached hereto and made a part hereof. It is understood that it is admitted only for the purposes of illustration and no claim is made that it is accurate or perfect.

Q. Describe the features of that trap.

A. This is our old-times traps in Cooks Inlet years

(Testimony of Hayward March.)

ago. This is the beach here, the shore line.

Q. The lower line? [35]

A. The lower line. You start from the beach with the first of your lead. You have stakes every six to seven feet; you start here and keep driving your stakes until you get out to your pot, you drive to the rim of your pot.

Q. On the lead you have what?

A. Large stakes like this; you drive them as far down as you can get them, so you can leave enough of the stake to splice a pole on; probably the stake is two or three feet above the ground. You drive them as far as you can but you must leave enough to splice a pole on. When you get the short stakes all driven, you take poles and as you go out the poles get longer and when you get to the pot the poles are 30 to 35 feet long according to the depth of the water. That is the way you build your traps, and you have the boats so that on the big run of the tide, you can work around this pot an hour or an hour and a half while the tide is out. You have dry land so you can fish up the floor of your trap before the tide comes in and drives you away.

Q. *You* long is your lead in this trap?

A. About five hundred feet, maybe a little longer.

Q. From the shore to the heart?

A. Yes, sir, from the shore to the heart, to the entrance of the heart.

Q. How do the fish get in?

A. When these poles are up, there is capping or ribbons around these poles to steady the poles; then

(Testimony of Hayward March.)

we guy these poles from side to side. After that is secured, then we put the web on—the trap can't catch any fish until the web is on—we put the web pretty deep and it goes down to the bottom and the fish come along the beach and they strike the lead and swim out and go into the heart and then into the pot and when you fish these traps, [36] you have a door on this side, another man will have the door on this side,—it is according to the place you are at and where you want your door; if it is convenient to have your door here, you have it here and if convenient at this end, you have it there—it is up to you.

Q. How are the pot and heart constructed? In this shape, as indicated on this map?

A. Yes, sir, just the same as the shape here. They come along the lead all the way, sometimes on the beach, and they swim along and come into this entrance and go into the pot—that is the entrance into the pot.

Q. This map does not show how it is constructed from the top down to the water?

A. No, sir; these stakes are driven down and about two feet left up to splice to like this—that is the way your lead is and another one here, and probably some of these stakes are five feet apart and some eight feet apart, on account of the ground underneath. If I drive a stake here and can't get it down very far, I will put one close up and if that stake goes down solid, I will go probably eight feet further—that is the way we construct these hand traps.

Q. Is the heart constructed the same way?

(Testimony of Hayward March.)

A. Yes, sir, the same way.

Q. And the pot the same way?

A. And the pot the same way.

Q. These poles are covered by what?

A. They are braced with what we call ribbons.

Q. And are covered with what? A. Webbing.

Q. What kind of webbing?

A. Wire webbing—I had wire webbing on the pot and the heart and [37] cotton webbing on the lead.

Q. Cotton webbing on the lead? A. Yes, sir.

Q. Was it double or single? A. The webbing?

Q. Yes. A. Single webbing.

Q. You said the lead was about five or six hundred feet?

A. Yes, sir, between five and six hundred—I can't exactly tell to the foot.

Q. What were the dimensions of the heart?

A. I believe my heart was 90 feet on each side.

Q. On each wing?

A. On each wing. This is the entrance to my pot here—I can't rightly say but I believe it was 90 feet from here to the entrance to the lead.

Q. Ninety feet one way or all around?

A. From here, right around.

Q. It would be 45 feet then?

A. Ninety feet on each side.

Q. This would be 90 feet?

A. From here, right around, the whole thing.

Q. (By the COURT.) What was it on one side—the upper line, what was the length of that?

(Testimony of Hayward March.)

A. Well, I wouldn't be able to just tell—the whole business I believe was 90 feet.

Q. That was 40 feet or 45 feet?

A. Yes, something like that.

Q. On each side— Was the other one about the same size?

A. Yes, we ain't particular within a few feet—we have no rule or square in building a trap. [38]

Q. What is this marked jigger—what is that for?

A. That is, when the fish go out and hit that jigger, so it will turn them and get them to hit the lead and sheer them into the heart.

Q. Is the jigger covered also with gear?

A. Yes, sir.

Q. The same way as the other?

A. The same way as the other.

Q. How large was your pot?

A. My pot was 24 by 30, I believe it was.

Q. Which way was the 30?

A. Thirty feet out this way and 24 feet this way, on account of the battens being 24 feet long and I didn't have a saw or splice.

Q. From the heart out to the outer line would be—

A. From here to here would be about 30 feet.

Q. And from the two sides—

A. That would be 24 feet long, 24 feet this way and 30 feet this way.

Q. Was there a flooring in that pot or heart?

A. Yes, sir, in the pot.

Q. How high was that flooring from the water?

A. A little over four feet, or five.

(Testimony of Hayward March.)

Q. Where was your door on the pot?

A. The door was at the outside, here.

Q. What was the size of your door?

A. The door was about, between four and five feet—it wasn't over five feet.

Q. Well, now, the fish came in on the floor of the pot? A. Yes.

Q. How high was it from the floor of the pot to the upper part of [39] the pot?

A. From the floor to the top, up to the top of the trap was 24 feet high.

Q. I mean from here down to the bottom?

A. Yes, from the top, what we call the capping, down to the floor was 24 feet high.

Q. How many fish would that trap contain approximately?

Mr. DIMOND.—We object to that as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

A. That would be very hard for me to tell.

Q. Would it contain 1000 or 2000 or 3000 or what?

A. When we built it we expected it to hold—

Mr. DIMOND.—We object to what he expected.

Objection overruled. Defendant allowed an exception.

A. (Continued.) When we build them small traps we look for the trap to hold ten or twelve thousand fish at least, when we build, them.

Q. Would it hold them?

A. Yes, sir, it would hold that.

(Testimony of Hayward March.)

Q. It would hold ten or twelve thousand fish?

A. Yes, sir.

Q. You say they furnished you a scow?

A. Yes, sir.

Q. And also a lighter, a double ender Columbia River boat? A. Yes, sir.

Q. How large was that Columbia River boat?

A. I think it must have been 30 feet—I never measured it.

Q. Tell about how large it was?

A. A good sized boat, I couldn't just say. [40]

Q. How wide was it?

A. It must be eight feet beam.

Q. About how large was the scow?

A. The scow was a very large scow,—it packed 1600 king salmon, I know.

Q. How long was the scow, about—was it longer than the boat? A. Oh, yes.

Q. Was it forty feet—you said the other was thirty feet?

A. That scow was very large; it was used for the fish lighter, but we call a scow the big long lighter we had there, an 8000 fish scow lighter.

Q. Would it be fifty or sixty feet long?

A. I couldn't judge how long that boat is.

Q. Was it longer than the lighter, than the Columbia River boat? A. Yes, sir.

Q. Was it twice as long?

A. Twice as long, yes.

Q. Was it twice as wide?

(Testimony of Hayward March.)

A. It was about twice as wide as the Columbia River boat.

Q. Where was this scow stationed in regard to the pot?

A. This scow is anchored from the pot so that it will give the scow water enough for the steamer to come alongside of that scow on any tide, low water or high water or any time. There was three fathoms of water where that scow was anchored at low water, so the steamer can go and take the fish from this lighter, that is, the fish lighter.

Mr. DIMOND.—We object as not responsive.

The COURT.—State where it was anchored?

A. I couldn't say how far from the pot, because I never measured the distance.

Q. About how far compared with your lead? Out as far as your lead? [41]

A. Oh, yes. That scow from my trap, I guess it wouldn't be as far as half way out to the Valdez wharf. I could look at the distance on the water if it was anchored and could tell.

Q. How would it be as compared with your lead? You say your lead was five or six hundred feet—would it be half that distance?

A. Yes, further than that.

Q. Would it be the whole distance of your lead?

A. Yes, twice as far as my lead.

Q. That is where the scow was anchored, was it? Was it anchored permanently there?

A. Yes, the captain of the "Reporter" brought it there and anchored it there.

(Testimony of Hayward March.)

Q. All during the time you were fishing?

A. Yes, during the time we were fishing.

Q. Did you have any means of conveying the fish from the trap to the scow? A. Yes, sir.

Q. How did you convey them?

A. I had this Columbia River boat and one more boat besides.

Q. How many fish would that Columbia River boat contain? A. I counted 900 from that boat.

Q. On the Columbia River boat? A. Yes, sir.

Q. How many fish could you take out there in a day, from the pot to the scow?

A. I could take considerable fish, providing I had the fish.

Q. If you had two thousand fish could you carry them out in a day?

A. I would be a poor fisherman if I couldn't.

Q. Could you take three or four thousand fish out?

A. Yes, sir. [42]

Q. Now, what time did you complete this trap? You say the agreement with Williams occurred the latter part of April, 1913? A. Yes, sir.

Q. At Kasiloff? A. Yes, sir.

Q. Captain Williams is the same gentleman who is sitting here? A. Yes, sir.

Q. Manager of the Alaska Packers Association?

A. Yes, sir.

Q. Now, when was the trap completed, after you got all this gear?

A. The trap was completed, if I remember right, on the 25th day of May—I believe it was the 25th

(Testimony of Hayward March.)

day of May the trap was completed for fishing.

Q. Did you start in fishing then? A. Yes, sir.

Q. What kind of fish was the first run?

A. King salmon and a few Reds mixed up with the king salmon.

Q. State whether the cannery boat came from the Alaska Packers Association to take these fish away?

A. Yes, sir, during the king salmon season.

Q. How often did they call?

A. They called every other day.

Q. For what length of time?

A. Until the king salmon ceased.

Q. From about May 25th until what time?

A. From about May 25th and I believe June 25th the king salmon stopped running.

Q. So they called from about May 25th to about June 25th? A. Somewhere around that time.

Q. Did they call after that? [43]

A. Very seldom.

Q. Did they call in July? A. Yes, sir.

Q. Do you remember what time they called in July?

A. I remember but I ain't positively sure, but I believe the "Reporter" called on the 18th of July, but I ain't rightly sure—I have been thinking this over, that she called the 18th, but I ain't rightly sure.

Q. Did you go from the trap to your home in Kenai any time during the month of July?

A. Yes, sir.

Q. State about that?

A. The time I went over to Kenai, I went there on

(Testimony of Hayward March.)

the "Libby," McNeil boat, the "Libble B." The king salmon season stopped running and I wanted to get home a few days and see my wife and family and I could catch the Kasiloff boat and walk up about two miles—

Mr. DIMOND.—We object to that.

Q. State about your trip?

A. This was the latter part of July. The king salmon season was over and the "Libby," McNeil camping outfit were going home.

Q. What time did you return then from Kenai?

A. I returned back to Kuskatan on the 5th day of July.

Q. How often did the boat call after that?

A. I don't remember only the 18th, up to the 28th day of July.

Q. Do you remember of Captain Williams' calling there?

A. I remember Captain Williams calling in the spring, when we started in fishing, once on the steamer.

Q. Calling at the trap? A. Yes, sir.

Q. What time?

A. I don't remember what day and date it was.

[44]

Q. Do you remember whether it was in June?

A. Yes, it was in June.

Q. What did he say?

A. I had a little breakdown in my lead and wanted to send to the cannery for a little gear and a few nails to fix it up and Captain Williams was on the

(Testimony of Hayward March.)

boat and spoke to me and told me to get a move on me and get my trap fixed up because he was after fish.

Q. About what time did the red fish run begin?

A. The run, what we call the run of red fish, started on the 24th.

Q. The big run of red fish?

A. The big run of red fish.

Q. The 24th of what? A. July.

Q. 1913? A. Yes, sir.

Q. What did you do?

A. The morning of the 24th of July I got up as usual. We can take a glass and look at the trap on high tide and if there is a quantity of fish in your trap, you can see them, and as I done that, I said to Mr. Hunter, "I guess the run of salmon is in." I took the boat and went out to the trap and Hunter started to fix the sloop up—it was lying there from the month of May up to that time—to get word to Captain Williams. I didn't pay much attention to Hunter and he didn't to me. I went to work the trap and took out 2500 fish that day and put them in the scow—2500 red fish.

Q. Took them out of the trap? A. Yes, sir.

Q. On that day that you spoke to Hunter?

A. Yes, sir, the 24th. [45]

Q. And you put them on your scow? A. Yes.

Q. Did you take out any the next day?

A. The morning of the 25th Mr. Hunter went to Kasiloff.

Mr. DIMOND.—We object to that as not responsive.

(Testimony of Hayward March.)

Q. Did you take out any the next day?

A. Yes, sir.

Q. How many did you take out that day?

A. 2500.

Q. Did you say that Hunter went away from the trap? A. Yes, sir.

Q. Where did he go? A. Kasiloff.

Q. When did he leave? A. The 25th.

Q. Of July? A. Yes, sir.

Q. These 2500 salmon you took out, red fish, you took out on the 24th? A. Yes, sir.

Q. And 2500 on the 25th? A. Yes, sir.

Q. Did any boat call from the cannery on those days? A. No, sir.

Q. How many did you take out on the 26th?

A. About a thousand.

Q. Did you do anything with the salmon you took out on the other two days?

Mr. DONOHOE.—We object to that question on the ground that it is incompetent, irrelevant and immaterial testimony and at this time we object to the introduction of any testimony whatever tending to show or establish that salmon were wasted or destroyed [46] at the place named in the indictment on any other date than the date alleged in the indictment, which was the 30th day of July, unless the Government at this time elects to announce the date on which they propose to hold this defendant under this indictment.

By the COURT.—The objection will be overruled and exception allowed. The evidence will be ad-

(Testimony of Hayward March.)

mitted for the purpose of showing the intent or the manner in which the defendant acted with regard to getting salmon or failing to get them and not as tending to establish the waste of fish on the day alleged in the indictment.

Mr. DONOHOE.—We make the further objection that you cannot introduce evidence tending to establish collateral crimes for the purpose of establishing the crime alleged.

Objection overruled. Defendant allowed an exception.

Q. On the 26th you say you took out a thousand?

A. Yes, sir.

Q. On the 27th did you take out any?

A. Yes, sir.

Q. How many? A. About a thousand fish.

Q. You say the boat did not call on the 24th?

A. No, sir.

Q. Nor on the 25th? A. No.

Q. Did it call on the 26th? A. No.

Q. I mean the cannery boat? A. No, sir.

Q. That boat was called what?

A. The "Reporter." [47]

Q. The "Reporter" didn't call on either of these three days? A. No, sir.

Q. Did it call on the 27th? A. No, sir.

Q. How many did you take out on the 27th?

A. About a thousand fish.

Q. Now, you had 2500 on the 24th, 2500 on the 25th, a thousand on the 26th and a thousand on the 27th?

A. Yes, sir.

(Testimony of Hayward March.)

Q. What became of these fish?

A. On the 26th—

Mr. DONOHOE.—We renew our objection to this question.

Objection overruled. Defendant excepts.

A. On the 26th I have taken out about a thousand fish. I kicked them into the two boats I had. There was too much for one boat and I divided them up into two boats and I took those fish out and put them all in one boat—it was smooth water and I kept the fish there all day until evening thinking the steamer would come.

Mr. DONOHOE.—Is that the evening of the 26th you are speaking of?

A. Yes, sir. And the steamer didn't come, and I held the 5000 fish I had in the scow; I dumped them overboard and threw the fresh fish in. On the 27th I took out about a thousand fish and threw them into the scow.

Q. When did the boat come, the "Reporter," the cannery boat? A. The 28th.

Q. The cannery boat came on the 28th?

A. Yes, sir.

The COURT.—How far is it from the cannery to this trap, about?

A. About 28 miles.

Q. It came on the 28th—at what time, in the morning or evening? [48]

A. I believe on the flood tide—it was somewhere around high water I know, when the boat came.

Q. What time? A. I couldn't exactly tell.

(Testimony of Hayward March.)

Q. How many fish did you have for them then?

A. I had then two thousand fish in the scow.

Q. What was done with those?

Mr. DONOHOE.—We object to that question on the ground that the law has elected for the Government to fix the charge, charge the crime, on the first day evidence was introduced tending to establish a crime. * * They cannot introduce evidence of a crime subsequent to the date either alleged in the indictment or fixed by the evidence. My position is this, that you cannot introduce evidence of the collateral crime for the purpose of establishing the crime alleged in the indictment, excepting for identity or as part of the res gestae.

The COURT.—The evidence will be received for the purpose of throwing light on this agreement between the defendant company and the prosecuting witness, showing their methods or manner of getting these fish. * *

Mr. DONOHOE.—I understand the ruling of the Court to be that evidence will go to the jury covering the period of time during which any fish were wasted there as testified to by the witness.

The COURT.—Testimony will be introduced showing the entire operation of this trap, as tending to throw light on the charge in this case, that on a certain day they were wasted, showing the methods used and the calling of defendant's boats or their not calling, as the case may be and showing the entire circumstances, so it can be ascertained whether they did use reasonable diligence and care in the protec-

tion of these fish or whether they wantonly [49] and recklessly wasted and permitted them to be destroyed—that is the question here.

Mr. DONOHOE.—So I may conduct my examination properly and understand the position of the Court, I wish to ask at this time what particular day you will instruct the jury—if they should find a verdict against the defendant on what particular date they must find the fish were wasted.

The COURT.—On the date alleged in the indictment, I take it.

Mr. DONOHOE.—The 30th day of July.

The COURT.—Yes, sir. We can take these matters up on the question of instructions.

Mr. DONOHOE.—We object to the introduction of any evidence tending to establish that any salmon were wasted or destroyed at the place alleged in the indictment on any other date than the 26th day of July, 1913, being the date first fixed by the evidence introduced by the Government.

Objection overruled. Defendant allowed an exception.

Mr. DONOHOE.—And we further demand that the Government elect the date on which they propose to stand for a conviction in this case.

The COURT.—I am not going to require the Government to do that. The indictment charges a certain date here and when it comes to the instructions, the jury will be instructed as to the dates on which the crime can be sustained, if at all.

Defendant allowed an exception to the ruling.

(Testimony of Hayward March.)

Q. What was done on the 28th?

A. On the 28th the steamer "Reporter" called, Captain Christiansen. He asked me what fish we had in the scow and I told him I had 2000 fish in the scow. "Well," he says, "I have got orders from the superintendent to come over and give you a receipt for what fish you have got, but I ain't going to take them." [50]

Q. He wouldn't take any?

A. He didn't take any.

Q. What became of the fish?

A. I threw them overboard.

Q. He wouldn't take the fish? A. No.

Q. Did he go away without any fish?

A. I scooped a few fish out alive as he laid there—I ripped the webbing from my trap and took them out with a scoop net, but I didn't count them. He gave me a receipt for the 2,000.

Q. He gave you a receipt for the 2,000 and told you to throw them overboard? A. Yes, sir.

Mr. DONOHOE.—We object to that—he didn't say that—to throw them overboard.

Q. Well, he wouldn't take them? A. No, sir.

Q. On the 29th of July did you have any fish?

A. Yes, sir.

Q. How many fish?

A. I had a few hundred fish, four or five hundred fish.

Q. On the 30th of July did you have any?

A. About the same.

Q. Four or five hundred fish?

(Testimony of Hayward March.)

A. Four or five hundred fish.

Q. Did the "Reporter," the cannery boat, call on the 29th or 30th for any fish? A. No, sir.

Q. Did you have any on the 31st of July?

Mr. DONOHOE.—We object to any testimony being introduced as to what happened on the 31st of July on the grounds stated in [51] our previous objection and on the further grounds that this is a date subsequent to the date laid in the indictment, mentioned in the indictment, which is the 30th day of July.

Objection overruled and exception allowed defendant.

Q. The day Captain Christiansen came with the boat was on the 28th, the 28th day of July, 1913?

A. Yes, sir.

Q. At that time he gave you a receipt as you have said? A. He gave me a receipt for 2,000 fish.

Q. And what became of the fish?

A. I threw them overboard.

Q. He wouldn't take the fish you said?

A. No, sir.

Q. Now, on the 29th day of July, 1913, how many fish were caught in the trap?

A. I had four or five hundred fish.

Q. On the 30th day of July, 1913, how many fish?

A. About the same quantity of fish, between four and five hundred fish.

Q. And on the 31st day of July, 1913?

Mr. DONOHOE.—We renew our objection.

(Testimony of Hayward March.)

Objection overruled. Defendant allowed an exception.

Q. Did you have any fish that day?

A. Yes, sir.

Q. How many fish did you have that day?

A. About the same, four or five hundred fish.

Q. On the first day of August, did you have any?

Mr. DONOHOE.—We make the same objection.

Objection overruled. Defendant allowed an exception.

A. Yes, sir.

Q. On the second day of August how many fish did you have? **[52]**

Mr. DONOHOE.—Same objection.

Objection overruled. Defendant allowed an exception.

A. I had a few hundred fish, probably three or four hundred fish each day—the fish were getting slack then.

Q. Did the boat, the cannery boat, the "Reporter," call on the 29th day of July, 1913?

A. No, sir.

Q. Did it call on the 30th day of July, 1913?

A. No, sir.

Q. What was done with the fish caught on the 29th and 30th days of July, 1913?

A. I left them in the scow until they got rotten and I threw them overboard.

Q. Did the cannery boat call on the 31st day of July, 1913?

Mr. DONOHOE.—We make the same objection.

(Testimony of Hayward March.)

Objection. Defendant allowed an exception.

A. No.

Q. Did the cannery boat call on the first day of August, 1913?

Same objection.

Objection overruled. Defendant allowed an exception.

A. No, sir.

Q. When did the cannery boat next call after the 31st day of July, 1913?

Same objection.

Objection overruled. Defendant excepts.

A. I believe the cannery boat called on the 28th—I don't remember of the boat calling only once, the day I quit fishing, that day I remember well—the last day I done my fishing; I believe the cannery boat called on the 5th day of August, I ain't rightly sure, but she called one time from the 28th to the 8th of August, the day I quit fishing. **[53]**

Q. Did you catch any fish on the 4th day of August?

Same objection.

Objection overruled. Defendant excepts.

A. Yes, sir, a few hundred.

Q. How many fish that day?

A. Three or four hundred fish.

Q. On the 5th day of August, did you have any?

Same objection.

Objection overruled. Defendant excepts.

A. Yes, sir.

Q. How many? A. A few hundred fish.

(Testimony of Hayward March.)

Q. Did the cannery boat call that day?

A. I don't remember.

Q. Did they take any fish that day?

A. They have taken no fish.

Q. They called once?

A. I believe, I couldn't right say, but I believe they called on the 5th of August—they called once from the 28th up to the 8th of August; that was the last time the boat called.

Q. Did they call on the 8th day of August?

A. On the 8th day of August the boat came—I had a little over 800 fish and the Captain told me—

Mr. DONOHOE.—We object to that on the same ground.

Objection overruled. Defendant excepts.

WITNESS.—(Continuing.) On the 8th day of August I had a little over 800 fish. The Captain came and he told me he had orders from the superintendent not to take any of the fish only what was fresh caught out of the water. Well, I had a talk with the Captain like a man would and I told him I couldn't send live **[54]** fish and what did the superintendent intend to do with me, keep me here all summer throwing away our fish and losing my time for nothing and I said I am disgusted and I am going to quit and Mr. Hunter notified him and him and I quit fishing.

Q. How many fish were there that day?

A. A little over 800 fish.

Q. How many were thrown overboard?

Mr. DONOHOE.—We object on the same ground.

(Testimony of Hayward March.)

Objection overruled. Defendant excepts.

A. About 800.

Q. So the cannery boat did not call from the 28th of July except one time, just prior to August 8th?

A. One time, but I don't remember exactly the date, but she called once I believe from the 28th of July up to the 8th of August.

Q. And what became of the fish you had collected from the 28th of July up to the first or second time the cannery boat called—what did you do with them?

Same objection.

Objection overruled. Defendant allowed an exception.

A. I threw them overboard.

Q. Now, coming back to the conversation you had with Captain Williams in the latter part of April, at Kasiloff, when you made this agreement or arrangement with him for taking the fish—who was present at that conversation? A. Mr. Hunter.

Q. Your partner? A. Yes, sir.

Q. With whom did Captain Williams have the conversation, with you or with Mr. Hunter?

A. I am the man that made the arrangement with him. **[55]**

Q. Who was the man that looked after the trap, largely after the trap? A. I am the man.

Q. Who is the man that knows more about the business at that trap? A. I am the man.

Q. At that conversation did Captain Williams tell you or say anything to you in regard to taking care of any surplus fish? A. No, sir.

(Testimony of Hayward March.)

Mr. DONOHOE.—We object to that and move to strike the answer on the ground that it is leading—the witness has already testified to the entire conversation as he remembers it.

Objection overruled and motion to strike denied. Defendant allowed an exception to the ruling.

Q. He didn't say a thing about taking care of any fish that he couldn't take care of? A. No, sir.

Mr. MUNLY.—That's all.

Cross-examination.

(By Mr. DONOHOE.)

Q. When did you go into partnership with Mr. Hunter in this fishing enterprise?

A. I went in about the 30th of April. I went to Mr. Hunter and we talked the thing over.

Q. You say about the 20th of April? A. Yes.

Q. What material did Mr. Hunter have on the ground for the erection of this trap at the time you got the webbing from Captain Williams?

A. He had the poles and the stakes. **[56]**

Q. Right up on the beach? A. Yes, sir.

Q. He got them out the previous winter?

A. Yes, sir.

Q. How far did he have to go to get that material?

A. I couldn't tell you because I wasn't in the woods there any distance.

Q. There is timber right around there, handy?

A. Yes, sir.

Q. Timber right down to the beach?

A. No, you have got to go back a little, a mile or a mile and a half before you get timber.

(Testimony of Hayward March.)

Q. What is on the beach?

A. Nothing, only rocks and hills.

Q. After you get up the hills, is there alders on it?

A. Yes.

Q. And scrub pine? A. Yes, and scrub spruce.

Q. And hemlock? A. Yes, sir.

Q. That comes right down close to the beach?

A. Yes, sir. There is a big bank about 800 or a thousand feet up from the beach.

Q. Now, talking about that scow—that scow was not originally sent over for your exclusive use?

A. Captain Williams—I asked him, and he told me he would furnish me a scow, as I had a trap there and I expected that—if he had said no, I wouldn't have built the trap.

Q. In the early part of the season that scow was used by other gill-net fishermen as well as you?

A. Yes, sir. **[57]**

Q. And in the king salmon season it was used generally by you and other gill-net salmon fishermen? A. Yes, sir.

Q. Did you catch most of your king salmon by gill-nets?

A. Some in the trap and some in the gill-nets.

Q. You caught a majority of them in the gill-nets?

A. Quite a few in the gill-net.

Q. And that scow was used jointly by you and several other gill-net fishermen?

A. Yes, they had one scow there and there was room enough on the scow for all of us at that time.

Q. And it was used that way until the red salmon

(Testimony of Hayward March.)

run commenced—during the king salmon run?

A. When the king salmon men left there, the scow was left in charge of me.

Q. Who left it in charge of you?

A. It must have been Mr. Williams.

Q. Who left it in charge of you?

A. The scow was left there, it wasn't taken away and I suppose it must have been left there by the superintendent.

Q. This scow was about sixty feet long?

A. I couldn't say it was sixty feet—it was a pretty large scow.

Q. You said twice as long as the Columbia River dory? A. I guess so.

Q. And how long is the dory?

A. About 24 or 25 feet, I never measured it and couldn't say to the foot or inch.

Q. Did Captain Williams or anybody connected with the Alaska Packers Association ever instruct you how or where you should build your trap?

A. No, sir. [58]

Q. Did they ever instruct you how you should manage your trap? A. No, sir.

Q. You and Hunter owned that trap and had complete control of it?

A. We were boss of it while we were there.

Q. You were boss of it during the season?

A. Yes, sir.

Q. And you fished when you wanted to fish and didn't fish when you didn't want to?

A. We fished every morning.

(Testimony of Hayward March.)

Q. Did you fish every morning during the month of July?

A. Yes, sir, every morning I went and looked at the trap, fish or no fish—it was my duty.

Q. You fished whenever you wanted to—nobody had any control over you?

A. No, nobody had any control to order me to do this.

Q. Captain Williams had no representative at this trap at all? A. No.

Q. How far is that Indian village from the trap?

A. That Indian village is probably 3,000 feet up over the hill—I couldn't just say, it is not a great ways, but there is a big hill to climb up to get there.

Q. It is an ordinary bank, up from the waterfront?

A. A very high bank.

Q. How much bare ground at low tide was there between the outer edge of the pot of your trap and low water?

A. I couldn't say the amount of ground there was, because I never measured the distance—I simply go by my judgment.

Q. What was your judgment?

A. The fact of the matter is, when I am fishing, I am not very much interested in looking at the ground.

Q. That is the best answer you can make at this time to that [59] question?

A. I couldn't answer just the distance.

Q. How far was the scow out from the pot?

A. The scow was probably between a quarter and

(Testimony of Hayward March.)

a half mile, probably—not measuring the distance but just by judgment.

Q. About half a mile out?

A. Probably between half and a quarter—I wouldn't say it was half a mile or a quarter,—it was a little distance, I call it.

Q. Your judgment about that distance is about the same as the distance the Indian village was away? A. I never measured this distance?

Q. Where did you live when you were at this trap?

A. I lived in a dugout, in the banks.

Q. Where did Mr. Hunter live?

A. Up on top of the hill.

Q. How many Indians lived in that village at this time?

A. I believe there was five or six Indians.

Q. They were catching fish and drying them at that time?

A. There was a very old native there, an old man and an old woman, and they would come down on the beach and would get a fish or two and take it on their back—they didn't want a great many to keep them going.

Q. You didn't ask them if they wanted any of these fish you caught?

A. No, I wasn't allowed to give them any fish from my trap.

Q. You were not allowed?

A. No, they were the company's fish.

Q. Weren't you allowed to give away these fish that you had to throw away?

(Testimony of Hayward March.)

A. If a man came and asked me for a fish, I would give him a **[60]** fish, but I wasn't allowed to give a native any quantity of fish; I put them in the scow waiting for the steamer.

Q. When you took these fish out of the net or trap, you made up your mind that if the cannery company didn't come and get them, you were going to throw them overboard?

A. I couldn't do anything else.

Q. You made no effort to handle them in any other way?

A. I had no way to do anything else with them but put them in that scow.

Q. And you kept putting them in the scow and throwing them overboard? A. Yes, sir.

Q. And you continued to do that after the 28th, although the "Reporter" wouldn't take the fish on the 28th?

A. Yes, he gave me a receipt but said he wouldn't take the fish.

Q. Did he tell you when he would be back again?

A. No.

Q. You didn't ask him?

A. I believe I asked him one time when I had conversation with the captain.

Q. Did you ask him when he would be back or didn't you? A. I wouldn't like to say I did.

Q. You don't know—now, what is the rule in Cook Inlet where the independent trappers furnish their own gear—do they get 4¢ apiece for Reds?

A. We get three cents.

(Testimony of Hayward March.)

Q. Where the independent trappers furnish their own gear, what rate have they been getting, furnishing their own gear?

A. Three cents—the company furnishes the gear.

Q. Where the independent trappers furnish their own gear, what **[61]** do they get for salmon?

A. I don't know.

Q. You never put any traps in with your own gear?

A. I never bought any gear of my own and put in a trap of my own but I used the company gear.

Q. The company in this case of yours furnished you with the gear that went on your poles and paid you three cents for the red salmon? A. Yes, sir.

Q. And twenty-five cents for the King?

A. Yes, sir.

Q. You didn't catch any humpies down there?

A. No humpies up there.

Q. Now you say this run commenced on the 24th, the run of Reds, the 24th of July? A. Yes, sir.

Q. Did you ever see the run commence that late before? A. I believe I did, one season.

Q. You don't know—you just believe?

A. I believe the run came one time on the 28th of July.

Q. You don't remember what year that was?

A. That was, I believe, in 1895, if I remember right.

Q. Now the average run there, as you testified at the trial the other day, was between the tenth and fifteenth of July, was it not?

(Testimony of Hayward March.)

A. On or about that time.

Q. Didn't you testify at the trial the other day that the boat called there on the 22d or 23d of July, and not on the 18th? A. No, sir.

Q. You don't remember testifying that way?

A. No, sir. [62]

Q. You say it did not call on the 18th?

A. I didn't say, on the 18th—I believe if I remember right—

Q. Might it not be the 22d? A. The 18th.

Q. Might it not be the 22d? How do you fix the date the 18th?

A. I kept a kind of reckoning of the time—I may be out one day or probably may be out two days, like a man would sometimes—he would mark the days of the month.

Q. You might be out three days?

A. No, not that much.

Q. Didn't you testify before that you didn't know when the boat came there previous to the 28th—the last time previous to that date?

A. I said I think the boat called on the 18th, but I ain't positively sure.

Q. What did you say at the trial the other day?

A. I don't remember rightly.

Q. What did Captain Christiansen say to you when he called there, between the 20th and 22d of July?

A. I don't remember of him calling at that time.

Mr. MUNLY.—We object, as not proper cross-examination.

Objection overruled.

(Testimony of Hayward March.)

Q. The last time he did call previous to the 28th—what did he say to you?

A. I don't remember my conversations with Captain Christiansen—one on the 28th day of July I remember and on the 8th day of August—that conversation I remember.

Q. You don't remember any other conversations?

A. No, sir.

Q. Is your memory as clear now as it was in October, 1914, when you [63] appeared before the grand jury at Seward and testified in this case?

A. That is a long time ago, probably it aint.

Q. Your memory would naturally be clearer then than it is now on matters occurring the year previous? A. I guess it would.

Q. Is it not a fact that you testified at that hearing that the fish were thrown away only on the 30th day of July and there was 2,000 of them?

A. I don't remember rightly.

Q. You wouldn't say that was not your testimony?

A. I wouldn't say it was the 30th, I might have been out two days.

Q. Didn't you testify at that time that there was one time that fish were wasted out there during the season of 1913?

A. Well, I believe I testified before the grand jury that I give a dead-reckoning that the fish I destroyed was between twelve and fourteen thousand, if I remember right, altogether, during my whole season's work.

Q. In this particular case? A. Yes, sir.

(Testimony of Hayward March.)

Q. You are sure you are not referring now to the Libby, McNeil case?

A. No, I testified in the Libby, McNeil case—I estimated my fish—

Q. You won't say you did not testify before the grand jury that you only threw over two thousand fish?

A. I was throwing over the fish right along, I had nothing else to do with them, day after day.

Q. You kept catching them and throwing them overboard day after day? A. Yes, sir. [64]

Q. And made no effort to take care of the fish in any manner?

A. I had no show to do it—I would only have been too glad if I could.

Q. You say it was not possible for you to dry these fish there on the beach, sun-dry them?

A. It was impossible.

Q. Why not?

A. I had to take my dory and go along the beach to gather a little wood for my camp and the position I was camped in, it was impossible and I didn't go to Kuskatan for that business.

Q. You went to Kuskatan to sell fish to the cannery? A. Yes, sir.

Q. And you wouldn't do anything with the fish except to sell them to the cannery?

A. I couldn't do anything—I had no barrels or anything and he mentioned nothing only for the cannery.

Q. Didn't you go to Captain Williams in 1914 and

(Testimony of Hayward March.)

ask for a trap again? A. No, sir.

Q. You appeared voluntarily before the grand jury and gave this testimony? A. No, sir.

Q. Who subpoenaed you?

A. I believe it was Mr. Cummings, a man I never saw before.

Q. Is it not a fact that you went to the district attorney voluntarily before the grand jury convened and stated these facts? A. No, sir.

Q. You made no mistake in stating that these fish were—you made no mistake, that these fish were thrown over in the fall of 1915?

A. I made no mistake as to the fish I destroyed at all. I was [65] called into the grand jury at Seward—didn't know what I was called for, until I was placed before the grand jury.

Q. You didn't know what you were called for until you were placed before the grand jury?

A. No, sir.

Q. You never had any interview with anybody regarding the destruction of these fish?

A. No, sir, only a receipt I got concerning the fish, that Captain Williams wouldn't pay for.

Q. You never talked to anybody previous to being called into the grand jury room?

A. I talked to one and another when I got home.

Q. You never talked to any of the officials previous to being called into the grand jury room?

A. No.

Mr. MUNLY.—We object to that. Objection sustained.

(Testimony of Hayward March.)

Q. Referring to Plaintiff's Exhibit "A," I will ask you to point out the place where the door was on the pot or trap as drawn on that exhibit?

A. Right here (indicating).

Q. That was in the centre of the outside line of the pot? A. Yes, sir.

Q. And what were the dimensions of that door?

A. That door was about between four and five feet.

Q. Five feet high and how many feet wide?

A. About five feet; it was a door so I could just stoop my head and get in.

Q. Would you say that the door was about five feet square? A. Between four and five feet.

Q. Square? A. Square. [66]

Q. There was nothing to prevent you from opening the door of that pot if you didn't want the fish?

A. When the water got down so I could open it, I could open it.

Q. That door was fastened in the deep water, was it? A. Yes, sir.

Q. With that door open the fish would escape out to sea again, if it was open permanently?

A. If the door was left open, naturally the fish would go out.

Mr. DONOHOE.—That will be all.

(By Mr. MUNLY.)

Q. When Captain Christiansen called on you on the 28th day of July, 1913, the first time after the red salmon run began, did he tell you that he wouldn't return, at that time? A. No, sir.

Q. Did he notify you anything of that kind?

(Testimony of Hayward March.)

A. No, sir.

Q. Did he notify you at any time that he wouldn't return? A. No. sir.

Q. Did Captain Williams ever notify you to cease fishing? A. No, sir.

Q. Now, something was said to the effect that they had no control of your trap—didn't Captain Williams when he called in June tell you to get busy, that he wanted all the fish he could get? A. Yes, sir.

Q. And he kept coming for fish right along at that time? A. Yes, sir.

Q. You said he returned a couple of times after even the 28th day of July? A. Yes, sir. [67]

Q. Some time around August 5th and August 8th?

Mr. DONOHOE.—We object to that as repetition.

By the COURT.—Yes, that has already been shown.

(By Mr. DONOHOE.)

Q. What was the size of that boat you had there at the trap? A. It was about 24 or 25 feet long.

Q. That is the company's boat—what was the size of the other? A. I never measured the boat.

Q. What was the size of the other boat you spoke of—the boat you had, independent of the company's boat?

A. That was a flat dory that Hunter built himself, a pretty large dory—it would pack quite a lot of fish.

A. How many fish?

A. I think it would pack 800 fish.

Q. How often did you fish that trap from the 24th of July on? A. What do you mean?

(Testimony of Hayward March.)

Q. How often, in each twenty-four hours, did you fish the trap?

A. Fished the trap every morning—if it was necessary for me to fish it on the next tide, I fished it.

Q. You remember you testified you fished it once each day?

A. Once each day—every morning; if it was necessary and I had the fish—

Q. Never mind that—how many times did you fish it each twenty-four hours?

A. Just the once, in the morning.

(By Mr. MUNLY.)

Q. How did you remove the fish from the trap to this dory or Columbia River boat—did you pew them out or dip them out? [68]

A. If I go out in the morning I wouldn't have to wait, for the floor to go dry, as I had a dory. I had battens so it would leave the dory about three feet from the door and when I opened the door, I got down on the floor this way (indicating) before the tide would get down to the floor. If I had a little fish and was in a hurry, I opened this door and when I opened the door, I took my scoop net and I could scoop the fish into the dory, until I got down to the floor—I didn't want to pew the fish. I could take five or six fish in the scoop net; and when the flood ran down I got down on the floor and pewed them. I could go to the scow and discharge my boat and return back to the trap again and if I got stuck on the tide, when the tide comes in again I can go and load the fish again.

Witness excused. [69]

Testimony of William J. Hunter, for the Government.

WILLIAM J. HUNTER, a witness called and sworn in behalf of the Government, testified as follows:

Direct Examination.

(By Mr. MUNLY.)

Q. What is your name and address?

A. William J. Hunter; Kenai, Cook's Inlet, Alaska.

Q. Did you live there in 1913?

A. I lived across the Inlet at that time, at Kuskatan.

Q. How far is it across the Inlet to Kenai?

A. About twenty-five miles.

Q. Were you at Kasiloff in the latter part of April, 1913? A. Yes.

Q. Who was there with you?

A. Hayward March.

Q. Did you see Captain Williams, the manager or superintendent of the Alaska Packers Association, the defendant, there? A. Yes.

Q. Did you talk with him or did Mr. March talk with him?

A. March was the man that done the talking when we met him.

Q. Were you present at that talk? A. Yes, sir.

Q. And heard it? A. Yes, sir.

Q. Relate that conversation.

A. March asked him about his chances of getting the trap gear and told him what he wanted to build

(Testimony of William J. Hunter.)

a trap, and I listened to their agreement all the way through. It was satisfactory to me.

Q. What did he say about taking the fish?

A. He said he would take the fish, all the fish we could catch.

Q. That was the only conversation you had with him? [70]

A. Well, we had a talk with him after that, but not in regard to the contract.

Q. Now, what did you do in regard to building the trap?

A. Well, we took some gear along with us in the sloop and went across and started building the trap.

Q. How much gear was furnished you?

A. I don't remember exactly how much there was; we got guy wire and net webbing, nails, etc.—what we could take by the boat.

Q. Do you remember how many coils of wire?

A. Six or eight coils, I am not positive which—we didn't take that in the boat.

Q. Do you know the price of this gear?

A. No, sir.

Q. How many hundred feet of cotton webbing did you get?

A. I don't know exactly, we had a good part of our lead made out of that—there must have been five or six hundred feet, four hundred any way, I wouldn't say exactly.

Q. Did he furnish you nails and boats?

A. Yes, sir.

Q. What boats did he furnish?

(Testimony of William J. Hunter.)

A. We had a lighter for the fish—a scow.

Q. How large a boat was that?

A. I judge it was something near forty feet long.

Q. That is the scow? A. Yes, sir.

Q. Any other boat?

A. Yes, a small boat, a double ender boat, a centre board boat that would probably carry seven or eight hundred fish.

Q. How many fish would the scow hold?

A. I don't know, we never had it anywhere near loaded. [71]

Q. Several thousand?

A. Yes, several thousand.

Q. Did you build the trap? A. Yes, sir.

Q. Did you see this plat? A. Yes, sir.

Q. Is that about the general style of the trap?

A. It is similar to the trap we had.

Q. What is it usually called?

A. A mosquito trap.

Q. Why?

A. Because it goes dry—it is dry most of the time.

Q. Did this trap go dry on the low tide?

A. Yes, once a day anyway it would go dry.

Q. How large was the pot of that trap?

A. Twenty-four feet one way I know. I don't know exactly the width of it. This way I know we had 24-foot battens but I don't remember the width of it.

Q. Was it about the same size the other way?

A. It was a little larger than it was in width.

Q. How big were the hearts of the trap?

(Testimony of William J. Hunter.)

A. Pretty near as wide, about the same width as the pot, if I remember right—maybe it projected out a little further.

Q. How deep would it go down?

A. The poles in the pot were about thirty feet long —at high tide it would go pretty well to the top of the pot—we had a webbing up near the top.

Q. How long was your lead there?

A. It was somewhere near 600 feet long, from the shore to the trap or to the heart. [72]

Q. How far out approximately was the scow anchored? A. Nearly half a mile I should judge.

Q. About half a mile out?

A. Anchored out in deep water, so the steamer could go alongside of it.

Q. How was the fish taken to the scow?

A. While I was there we took them out in the small boats.

Q. How many small boats did you have?

A. We had one belonging to me.

Q. Did you have a large boat too?

A. The cannery boat, a 24 feet boat.

Q. You had some small boats also?

A. I had one of my own and there was others we could get if we needed them.

Q. About what time did you have that trap completed?

A. I am not positive, between the 20th and 25th of May.

Q. 1913? A. Yes, sir.

Q. Did you begin to fish it right off?

(Testimony of William J. Hunter.)

A. Yes, sir.

Q. What did you fish for?

A. King salmon principally.

Q. Did the cannery boat come to get those fish?

A. Yes, sir.

Q. How often did it call?

A. Every other day, as far as I can remember.

Q. During what time?

A. During the month of June, until the latter part of June—from the 25th of May to the latter part of June.

Q. About what time did the run of king salmon slacken or cease? [73] A. The last of June.

Q. Did the boat call then?

A. It called up to the time the king salmon run was fished pretty regular.

Q. How often would it come after that?

A. I don't remember—it didn't come very often that I know of.

Q. Was there any run of fish between the ceasing of the king salmon run and the red run?

A. No, there wasn't any run to speak of.

Q. Now, when did the red run, the big run of red salmon, begin? A. The 24th of July.

Q. 1913? A. 1913.

Q. Were you there at the trap at the time?

A. Yes, sir, I was at home, I wasn't right at the trap. Mr. March went down and reported fish and I told him I thought I had better get my boat ready and go over and notify Captain Williams.

Q. What did you do?

(Testimony of William J. Hunter.)

A. I had my boat pulled up high and dry, I couldn't keep it anchored and I had to launch the boat. It took me all day of the 24th to get ready and I got it launched on the 25th and went across the Inlet and when I got to Kenai that day, on account of the head winds, I staid there and next day went to Kasiloff, the 26th and notified Captain Williams we had fish and he said he would send right over.

Q. What did he say?

A. He said he would send a boat right over after the fish.

Q. You got over to the cannery as soon as you could? A. Yes, the way the weather was.

Q. And you notified them as soon as you could? [74] A. Yes, sir.

Q. Did they say anything to you about notifying them? A. No, sir.

Q. Do you remember the time they called prior to the 24th day of July—do you remember the last time they called? A. No, not exactly.

Q. Could you fix it within a day or two?

A. I am satisfied they never called within three days anyway before that.

Q. Do you know when they called after you notified them?

A. I didn't go home on the 27th but on the evening of the 28th, I believe, I got home and my partner said the steamer had been there after fish.

Q. You were not there then? A. No.

Q. Were you there at any subsequent time that the boat called? A. After the 24th?

(Testimony of William J. Hunter.)

Q. After the 28th?

A. Yes, I was there about August 5th, somewhere along there she called and I went out to the boat.

Q. About this time were you around the cannery, from the time you left on the 24th of July, 1913, were you around the cannery much? A. No.

Q. Why?

A. You mean around the trap, don't you?

Q. Yes, I mean the trap, not the cannery.

A. I wasn't there very often. When I left I hired a native to help Mr. March and he didn't need me—there wasn't many fish after the first few days. [75]

Q. Were you there on the 29th or 30th?

A. I think I was at home on the 29th and 30th.

Q. Did you see any fish there on those two days?

A. No, I didn't pay any attention.

Q. Did any boat call there for the fish?

A. Not before the 5th or 6th, I don't think.

Q. Did you go down to see the steamer that day?

A. Yes, sir.

Q. Was there any fish ready for them?

A. We had four or five hundred fish.

Mr. DONOHOE.—We object to the introduction of any testimony from this witness, tending in any manner to prove or establish the waste or destruction of salmon, at the place named in the indictment, at a day later than the 30th day of July, 1913, being the day named in the indictment, and the further objection that the Government in this case is bound by the testimony offered through the witness March for the day on which to lay the crime, the 26th day

(Testimony of William J. Hunter.)

of July, 1913, being the first date testified to by said witness that the salmon were wasted or destroyed.

Objection overruled; defendant allowed an exception.

Q. Were you there on the 8th day of August?

A. Yes, sir.

Q. At the trap? A. Yes, sir.

Q. Did you see any salmon that day?

A. Yes, sir—we had some salmon, I think something like eight or nine hundred salmon.

Q. Was the cannery boat there? A. Yes, sir.

Q. Did they take these salmon? [76]

Same objection. Objection overruled; defendant allowed an exception.

A. No, sir.

Q. They didn't take the salmon? A. No.

Mr. MUNLY.—That's all.

Cross-examination.

(By Mr. DONOHOE.)

Q. Where did you live in 1913?

A. I lived over at Kuskatan.

Q. You have a family there?

A. Yes, sir—I had at that time.

Q. Now, how far is that native village from the trap?

A. Four or five hundred yards I guess up to the village.

Q. How many natives were in that village along—well from the 24th of July until the early part of August?

A. I couldn't tell you the exact number, some of

(Testimony of William J. Hunter.)

them went to the cannery—there wasn't more than five or six there at any time.

Q. It is your judgment that there were five or six there?

A. There was five or six able-bodied natives there.

Q. You took no active part in the management of the trap after the early part of July, when the king salmon run stopped?

A. No, I was not there, but I would have taken part if there had been anything to work for.

Q. You took no active part in the trap management after that time?

A. No, March attended to the trap.

Q. You say a portion of this lead was made with cotton webbing? A. Yes, sir. [77]

Q. Is it not a fact that that webbing got badly perforated with holes in it and a great many fish passed through the web and you got very few fish in the trap?

A. As far as that is concerned, I don't think there was many holes the fish could go through.

Q. You say this red run commenced on the 24th?

A. Yes, sir.

Q. Could you see the trap from your house?

A. Yes, by going back on the bank a little.

Q. Your house is at the edge of this Indian village? A. Yes, sir.

Q. When was that trap fished on the 24th?

A. I am not certain what time of the day it was.

Q. You didn't fish it? A. No, sir.

Q. You didn't fish it on the 25th either?

(Testimony of William J. Hunter.)

A. No, sir.

Q. Or help fish it? A. No, sir.

Q. What time in the morning of the 25th did you leave the trap and go to Kasiloff?

A. It depends on the stage of the tide,—I don't remember what time it was; we generally left there on high water to cross the inlet.

Q. It was the tide after the trap was fished on the morning of the 25th?

A. I am not certain whether it was or not,—whether we fished that morning or not.

Q. Who did fish the trap on the 24th?

A. From what I heard I suppose Mr. March.

Q. How far were you from where they were fishing the trap? [78]

A. At least three-quarters of a mile from the trap, I couldn't see much.

Q. You saw Mr. March on the evening of the 24th?

A. Yes, sir.

Q. And he never mentioned to you how many fish he had caught? A. No, sir.

Q. You don't know how many fish he had caught?

A. No, sir.

Q. And you don't know how many fish he caught on the 25th? A. No.

Q. And you don't know how many fish he caught from that time on?

A. No, I didn't count them at all.

Q. You spoke of a dory you had?

A. Yes.

(Testimony of William J. Hunter.)

Q. Did you use that dory when you were fishing at the trap?

A. Not that I know of,—never had call for it unless it was while I was away.

Q. You never used it while you were fishing?

A. No, we never used it for king salmon fishing.

Q. You never used it to transfer the fish from the trap to the scow? A. No, I did not myself.

Q. Do you know of your own knowledge whether anybody ever used it?

A. No, sir, I left it there when I left.

Q. Did you see it used any time?

A. No, sir.

Q. In the building of this trap—you had a lot of trap poles already cut before you went to Captain Williams? A. Yes, sir.

Q. You cut those under contract with the Northwestern Fisheries [79] Company to give you webbing? A. Yes, sir.

Q. And you went to Captain Williams to get the webbing so you could use those trap poles you had cut?

A. I didn't have anything to do with the Northwestern or Captain Williams either. Mr. March made arrangements with the Northwestern to build a trap and they couldn't furnish the gear and Mr. Loughlin told me to go to Captain Williams, he thought he would give me the gear.

Q. The Northwestern decided not to furnish it?

A. They wouldn't get any gear.

Q. You were very much dissatisfied at the treat-

(Testimony of William J. Hunter.)

ment that you got at that trap in 1913 from the Packers people, were you not? A. I think I was.

Q. Now, is it not a fact that in the spring of 1914 you again went to Captain Williams and wanted him to furnish you with gear to build another trap?

A. No.

Q. You swear positively that no such conversation took place?

A. Yes, I might have asked him something about fish net but not trap gear.

Q. To refresh your memory I will ask you if some time in the month of April, 1914, at the Kasiloff cannery, you did not have a conversation with Captain Williams in words and language to this effect—you asked Captain Williams to give you web and gear to build a fish trap at West Foreland, where you had the trap the previous year? A. No.

Mr. MUNLY.—We object to that.

Mr. DONOHOE.—The purpose of this is to show the reason why this prosecution is brought. [80]

Q. Is it not a fact also that in that conversation Captain Williams offered you gill-nets and you refused the gill-nets and said you would get them from Libby, McNeil & Libby? A. No, sir.

Mr. MUNLY.—We object as not proper cross-examination.

Mr. DONOHOE.—We wish to show the feeling of the witness.

By the COURT.—You may proceed.

Q. Is it not a fact that later in the season of 1914 when some natives were fishing with gill-nets for

(Testimony of William J. Hunter.)

Captain Williams along the beach, close to where you were, you claimed that they were trespassing on your ground and sent Captain Williams word that if he didn't take those natives away from there, you would make it cost him a good deal more money than he would gain by it?

Mr. MUNLY.—We object to this as not proper cross-examination and having no bearing on the issues in this case.

Objection overruled.

A. No, sir.

Q. You never had any trouble with those natives at all?

A. I sent word to Captain Williams at the time we had the trap there—it wasn't natives, it was white men.

Q. You had no trouble with natives that were fishing for Captain Williams with gill-nets in 1914?

A. No, sir.

Q. You went before the grand jury in October, 1914? A. Yes, sir.

Q. Do you remember how many fish you testified were wasted, at that time? A. No, sir.

Q. Things were naturally more clear in your memory then *that* they [81] would be now?

A. Yes—I know we lost two thousand that we never got pay for.

Q. Didn't you testify at that time that the day the fish were wasted was the 30th day of July, 1913?

A. I don't think I did, the exact day—I may have, but I don't believe I did.

(Testimony of William J. Hunter.)

Q. What interest did you have in that trap?

A. My interest was what I could make out of the fish—that is all the interest I had.

Q. What interest did Mr. March have in it?

A. He bought half of the poles, he paid for half of the expense of the poles and of the trap—we both paid half the expense of the trap.

Q. You people built that trap according to your own ideas, without any supervision of the defendant corporation or Captain Williams?

A. It was according to March's idea—I knew nothing about the trap and never had any idea of it before.

Q. You were not an experienced fisherman at that time? A. No.

Q. You operated that trap, you and March?

A. Yes, sir.

Q. Whenever you wanted to—you had complete control of it? A. Yes, sir.

Q. Captain Williams had no representative on the ground? A. No.

Q. He had no right to open the door of the pot, if he wanted to do it?

A. I suppose he could have done it.

Q. If he came over there in force—but you people managed that trap in all its details—he never supervised it at all? [82] A. Not that I know of.

Q. You would know if he did while you were there?

A. Not while I was there—he wasn't there that I know of.

Q. It was arranged between you and March on the

(Testimony of William J. Hunter.)

one side and the defendant company on the other, when the red salmon run started, you would go over and notify him? A. No, sir.

Q. It was not so arranged? A. No.

Q. Why did you start to get ready to go over then within a few hours after you discovered the red run was on?

A. Because they hadn't been there for several days and I wanted him to know we had fish and we hadn't had fish for the last few weeks.

Q. And he hadn't been calling for the last few weeks? A. Not that I know of.

Q. And you notified him on the evening of the 26th?

A. Yes, some time during the day, whether it was evening or not I don't know—I think it was somewhere near noon, at the neap tide.

Q. If Mr. March threw away a quantity of salmon on the evening of the 26th of July, would it have been possible for the defendant company's boat to have got to that trap after you had notified Mr. Williams and before Mr. March had thrown those fish away?

Mr. MUNLY.—I object to that.

Objection overruled.

A. I don't know whether he had time or not, it depends where his boat was that he wanted to send and it depends somewhat I suppose on the tide.

Q. It is your best judgment he would not have had time? [83]

A. He had plenty of time to get there the next day.

(Testimony of William J. Hunter.)

Q. I am speaking now of the evening of the 26th?

A. I don't know exactly what time of the day it was.

Q. Tell the jury what your best judgment is?

A. How is that?

Q. Tell the jury what your best judgment is as to whether he had time to get there before March threw away those salmon or not, after you notified him on the 26th of July?

A. I think he had if the boat had been there ready to go—I left Kenai in the morning of the 26th and it is only ten miles and fair tide.

Q. Didn't you testify in the former trial of this case that it was some time in the afternoon or evening that you notified Captain Williams?

A. It might have been—I might have had to wait for the tide to get into the river.

Q. If it was some time in the afternoon when you notified him, he would have had to have a boat ready at the wharf at that time, ready to move, to get over there before the fish were thrown away?

A. He could have gotten over in four hours if he was ready to go.

Q. If he had a boat right at the wharf and if the tides were right?

A. It depends on when you can get out of that river.

Q. You can only get out when the tides are right?

A. It depends on the stage of the tide, whether it is neap tides or spring tide.

Q. You will agree it would have been nip and tuck

(Testimony of William J. Hunter.)

at least to have gotten there before the fish were thrown away?

A. I don't know what time the fish were thrown away.

Witness excused. [84]

AFTERNOON SESSION.

By the COURT.—Before the plaintiff closes its case, I think it should be required to elect on what date it will stand for a conviction in this case, on what date it will elect to try the charge of wanton destruction of fish and the jury will be instructed that the testimony of other and similar offenses on other dates is admitted only for the purpose of explaining the entire situation or transaction and for the purpose of showing the intent and motive with which the defendant acted in the matter of the charge when the offense relied upon for a conviction was committed, if committed at all. Now, if you will elect what date you desire to stand on, Mr. Munly—

Mr. MUNLY.—Since the Court has announced the law in the case to that extent, I will elect the 28th day of July, 1913, to stand upon.

By the COURT.—Very well.

Mr. DONOHOE.—The defendant excepts to the election made by the Government at this stage of the trial, our contention being that the election should have been made at the commencement of the trial.

Exception allowed.

Mr. MUNLY.—On account of being required to make that election, I have no further evidence to in-

troduce. The State will rest unless the witnesses are recalled for rebuttal.

Mr. DONOHOE.—At this time the defendant moves the Court to strike out of the record the testimony regarding the waste or destruction of salmon at or near the place mentioned in the indictment, at any day subsequent to the 28th day of July, 1913, on the ground that it is incompetent, irrelevant and immaterial testimony.

By the COURT.—The objection will be overruled, or rather the [85] motion will be denied and exception allowed. The jury will be instructed as to the effect of that evidence, that it is not for the purpose of proving the offense alleged to have been committed on the 28th day of July, 1913, but only as it tends to show a general course of conduct and going to explain or show the motive or intent with which the defendant acted.

Exception allowed.

GOVERNMENT RESTS.

Mr. DIMOND.—Comes now the above-named defendant, at the close of the testimony on the part of the Government, and moves this Honorable Court for an order to instruct the jury to return a verdict finding the defendant Not Guilty of the crime charged in the indictment. This motion is based upon the following grounds:

1. That it appears from all the testimony offered upon the part of the Government that if any fish or salmon were destroyed or wasted at the place and time alleged in the indictment, on the date elected by

the Government as the date on which they would stand for the time, to wit, the 28th day of July, 1913, they were destroyed or wasted by the two witnesses William J. Hunter and Hayward March and not by this defendant and that this defendant was in no wise criminally liable for the waste and destruction of such fish.

2. That it appears from all the testimony introduced by the plaintiff that the fish tray in which these fish or salmon were caught was entirely operated and controlled by the Government's witnesses, William J. Hunter and Hayward March, and that the defendant corporation had no supervision or control over the management or operation of the same. That the said two [86] Government witnesses took fish from said trap at such times and in such manner as they saw fit and that they, the said two witnesses, were not subject, in any manner, to the orders, control or direction of the defendant company; and if it were impossible for the company, for the defendant corporation, to take care of the fish caught in said trap, it had no power or control over the operation of said trap, so it could prevent the fish entering said trap, or open the door in the pot of said trap so the fish could pass through and escape and therefore the defendant corporation is in no manner criminally liable for the alleged waste or destruction of the salmon in question.

3. That the Government has wholly and utterly failed to show by its testimony that the defendant company wilfully, unlawfully or wantonly did waste or destroy any salmon whatever at the time and place

alleged in the indictment, or upon the 28th day of July, 1913.

4. That from the testimony introduced by the Government, the Government has utterly failed to establish that there was any salmon whatever destroyed or wasted, at or near the place described in the indictment, on the day alleged in the indictment.

5. That if the defendant corporation was in any manner criminally responsible for the waste and destruction of the salmon, as alleged in the indictment, the Government has utterly failed to show such responsibility and to prove the crime charged in the indictment against the defendant by any testimony, act or circumstance other than the testimony of William J. Hunter and Hayward March, and that the testimony of these two Government witnesses clearly shows that if the crime was committed, as alleged in the indictment, that they were accomplices in the [87] commission of the crime and therefore a conviction of this defendant cannot be had on the testimony of such accomplices, uncorroborated as it is by any other evidence tending to connect the defendant with the commission of the crime. The motion was by the Court denied. To which ruling of the Court defendant is allowed an exception.

DEFENSE.

Testimony of Charles H. Williams, for Defendant.

CHARLES H. WILLIAMS, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination

(By Mr. DIMOND.)

Q. State your name. A. Charles H. Williams.

(Testimony of Charles H. Williams.)

Q. What position, if any, do you hold with relation to the defendant corporation, the Alaska Packers Association?

A. I was superintendent at Kasiloff that year.

Q. What year? A. 1913.

Q. Were you superintendent there in any previous years? A. Yes, sir.

Q. How many? A. I was there since 1907.

Q. At Kasiloff? A. At Kasiloff, yes, sir.

Q. How long have you been engaged in the fishing business? A. About twenty-eight years.

Q. You are very familiar with the business?

A. Fairly so.

Q. Where were you in 1914 and '15? [88]

A. In 1915 I was in Bristol Bay and in 1914 I was at Kasiloff.

Q. Do you remember meeting the Government's witnesses, William J. Hunter and Hayward March, in the spring of 1913? A. I do.

Q. What time was that?

A. Well, it was some time in the latter part of April.

Q. Where did you meet them? A. At Kasiloff.

Q. At the cannery? A. At the cannery, yes.

Q. What time of the day was it that you met them?

A. It was after supper, I think, around seven o'clock.

Q. In what part of the cannery did you meet them? A. Down at the wharf.

Q. Did you have any conversation with them?

A. Yes.

(Testimony of Charles H. Williams.)

Q. State what that conversation was.

A. Well, Hunter came to me and asked me if I could furnish them what gear would be necessary to build a trap over at Kuskatan and after talking it over I told them that I thought I could, that on account of the running of the king salmon gill-netters etc. over there it would not be inconvenient for us to attend to it.

Q. Was that all your conversation?

A. When we were talking it over I told them I would furnish them the gear but that it would be necessary for them, in case we were oversupplied with fish, or for any reason our boats, from stress of weather, couldn't call there, it would be necessary for them to take care of the fish, so it wouldn't spoil and they told me it was an understood thing, they knew that from [89] olden times.

Q. At that time did you have any reason to believe they could not take care of their surplus fish?

A. No, I did not.

Q. With whom did you hold this conversation?

A. Mr. Hunter.

Q. Was March present at any time during that conversation?

A. Yes, I think he was on the wharf at the same time and we were talking it over together, the three of us; later on, after I promised Hunter that I would do it, then March came up.

Q. Did he assent to this contract in any manner?

A. I think so—I never spoke to March, whether he assented to it or not—I spoke to Hunter.

(Testimony of Charles H. Williams.)

Q. You heard March's testimony that he had the conversation with you? A. Yes, I did.

Q. You say he is mistaken in that respect?

A. In that respect he is, yes.

Q. How do you recollect so distinctly that you made the contract with Hunter?

A. Well, I recollect that I wouldn't have made a contract with March.

Q. Why?

A. I don't consider him very reliable—he worked for me before and didn't prove very satisfactory.

Q. How is the name carried on your books, March or Hunter or March & Hunter or Hunter & March?

A. Hunter & March—the one that makes the agreement, we always carry him first on the books.

Q. Did you take any fish caught by Hunter & March after that time? [90]

A. Yes, whenever they had any fish we took them.

Q. How long did you continue to take fish?

A. All through the season.

Q. Do you recollect Hunter's coming over to the cannery in the month of July, 1913?

A. I think that Hunter was there—it is quite a long while ago but I think that he must have been there.

Q. Do you recollect the day? A. No, I do not.

Q. When he testified he came over on the 26th, would you say that was correct?

A. I couldn't contradict him at all.

Q. As far as you know?

(Testimony of Charles H. Williams.)

A. As far as I know that is the right date, I don't know any different.

Q. What did Mr. Hunter say to you on that occasion about fish?

A. Well, as far as I know, he told me that there was some fish over there.

Q. What did you do then, if anything?

A. I told him we would send a boat over as soon as we could.

Q. How soon did you send the boat over?

A. On the next tide, as far as I recollect.

Q. How many hours after Hunter was there did you start the boat? A. I couldn't say.

Q. About how long? A. I couldn't tell you.

Q. Are you sure you sent it on the next tide?

A. I sent it on the next tide, if the boat was there—I don't recollect if the boat was there; if it was there it went out on the next tide.

Q. How many power boats did you have in connection with the cannery? [91]

A. I had four pretty good-sized boats and one a little smaller—five power boats.

Q. And they were all used to transfer the fish from the different traps and places where they were caught to the cannery?

A. Yes, they would tow the lighters.

Q. Are you positive that you sent this boat at the earliest moment you could after Hunter notified you they had fish? A. I am.

Q. Did you get any fish at that time?

A. No, we got no fish.

(Testimony of Charles H. Williams.)

Q. Why, if you know?

A. I asked the captain of the boat and he said the fish were spoiled.

Q. That is all you know about it?

A. That is all I know about it.

Q. You have no personal knowledge?

A. No, I have not.

Mr. MUNLY.—I move to strike that out.

By the COURT.—Yes, confine your testimony, Captain, to matters you have personal knowledge of.

Q. Do you know when the boat went over there again to Hunter & March's trap?

A. No, I couldn't say the dates.

Q. Did you have any boat on that particular run, that was supposed to call at that particular trap?

A. The "Reporter" is the boat that had the run on that side.

Q. Did you call at any other place except this trap, I mean generally speaking?

A. No, generally speaking, I did not, but I can't recollect if I [92] did call at any other trap during that time—it is a little too long; I could guess at it but couldn't say definitely.

A. Didn't the "Reporter" have a general run—didn't it have a usual course? A. Yes, sir.

Q. Where did it call when it made its usual run?

A. It called at Kalgin Island.

Q. Point it out on the map.

A. This little island running down here (indicating on map). The cannery is here; it ran over here to Kalgin Island, then to the Hunter & March trap and

(Testimony of Charles H. Williams.)

then to the Howard & Pound trap and then back to the cannery.

Q. Who was the captain of this "Reporter"?

A. Captain Christiansen.

Q. And he usually made the run in the manner you have stated?

A. Yes, he usually made that run, if the weather was so he could.

Q. How long did it take him to make it?

A. Well, it would take around about eighteen hours, if the weather was fair and if the weather was bad, it might take him twenty-four hours.

Q. How often did he make the run?

A. He was supposed to make the run as often as he could,—that would be about every other day, once in forty-eight hours.

Mr. MUNLY.—I object to this line of testimony unless he shows that he knows it from personal knowledge.

By the COURT.—No, he is telling what the usual run was, not that the boat actually did so. Objection overruled.

Q. When did the run of king salmon cease in 1913?

A. It finished up the latter part of June.

Q. When did the run of red salmon begin? **[93]**

A. It began that season on the 25th of July.

Q. How do you recollect this particular date?

A. Because it was the latest date we ever had the run of red salmon up there.

Q. When does the run of king salmon usually begin?

(Testimony of Charles H. Williams.)

A. It began the first part of June—we generally get ready to start fishing the first part of June, send the gill-nets over.

Q. I meant red salmon, not king—when does the run of red salmon usually begin?

A. As a general rule they start in around the 15th, up to the 18th or 20th.

Q. And you say the day on which they began to run that year, the 25th, was the latest you have knowledge of?

A. Yes,—we didn't expect any that year, it got too late.

Q. Now, with reference to the run of salmon, do they always run in the same place in Cook Inlet each year?

A. No, altogether different—a trap that will catch fish this year might not catch any next year or the year after—it is altogether different; one year they are on one side of the Inlet and come in below Anchor Point and probably the next year come in up by Kenai.

Q. Would the fact that you got fish in your traps on the east side of Cook Inlet in 1913 on the 25th of July be any sign that Hunter & March had any fish in their trap at that time?

A. Not at all—no reason at all.

Mr. MUNLY.—We object to that.

Objection sustained.

Q. How many traps have you up there or did you have in 1913? A. We had about eleven traps.

Q. Where were they located, on which side of the

(Testimony of Charles H. Williams.)

inlet? [94] A. All on the eastern side.

Q. Didn't you have any on the west side?

A. No, I had no trap myself; Hunter & March had one and Howard & Pound had one, but those were their traps, they were not ours. I had one on Kalgin Island—that was our trap.

Q. You say that Howard & Pound had a trap on the west side of the Inlet? A. Yes, sir.

Q. Where was that located?

A. That was located below *Tyonek,* a place called Goose Bay. It was at Goose Bay where Howard & Pound had their trap.

By the COURT.—That is not in Knik Arm?

A. No, it is on the opposite side of the Inlet.

Q. How far is the Howard & Pound trap from Kasiloff?

A. Well, around twenty-eight or thirty miles.

Q. How far is the Hunter & March trap from the cannery at Kasiloff?

A. About ten or twelve miles further up.

Q. What kind of a contract did you have with Howard & Pound?

A. The same as I had with Hunter & March.

Q. And did they take care of the surplus fish that you didn't use? A. Yes, they took care of it.

Q. How do you know?

A. No, I don't—no doubt salted it—I don't know.

Mr. MUNLY.—We object to that.

Objection sustained—answer stricken.

Q. Did you have any trouble with Hunter in 1914?

(Testimony of Charles H. Williams.)

Mr. MUNLY.—We object to that.

Objection overruled.

A. Well, I had this much trouble with Hunter—he told the captain [95] of the steamer that he wanted us to take our men away from where he was fishing with gill-net during the king salmon season.

Q. Who were these men?

A. They were natives.

Q. Hired people?

A. They were none of our regular men—they were all Alaskans.

Q. Did he make any threats against you that you know of?

Mr. MUNLY.—We object to that.

Objection overuled.

Q. Do you know whether Mr. Hunter made any threats against you, if you failed to comply with his wishes in that respect?

A. He never said anything to me personally about it, but he sent word over to take the men away.

Q. Did Hunter ask you for gear for a trap in 1914?

A. Yes, they came and asked me for gear in 1914.

Q. And you refused? A. I refused, yes.

Q. What did you do?

A. I told him I wouldn't give them any gear, I told them I would give them gill-nets if they wanted to go gill-netting and they told me they could get all the gill-nets they wanted from Libby, McNeil and didn't want any.

Q. Did you or any other officers of the Alaska

(Testimony of Charles H. Williams.)

Packers Association have any control over Hunter & March's trap in 1913?

A. No, no control over the trap, we had nobody there to look out for it; they looked out for it themselves—we had nothing to do with it at all.

Q. Did you at any time ever give them any directions how they should run the trap, or when they should fish or anything of [96] that nature?

A. Never.

Q. And they, as far as you know, did just as they pleased with the trap, is that true? A. Sure.

Mr. DIMOND.—That is all.

Cross-examination.

(By Mr. MUNLY.)

Q. You say you had this conversation with Hunter alone? A. Yes, sir.

Q. You said you did not have a conversation with March? A. No, sir.

Q. You testified in this case the other day, did you?

A. Yes.

Q. Was that Thursday of Friday?

A. I don't quite recollect what day it was.

Q. Well, it was either Thursday or Friday, anyway. Did you ever mention that you had not any confidence in Mr. March in your testimony at that time?

A. No, I don't think that was brought out.

Q. Isn't this an after reflection?

A. No, not at all.

Q. It wasn't brought out before—you didn't bring it out before? A. No, it was not brought out.

(Testimony of Charles H. Williams.)

Q. Did you say in your previous testimony, on Thursday or Friday, that they would have to look after their own fish? A. If it was asked, I did.

Q. I am asking you now, did you say that?

A. If that question was asked I answered just that way. [97]

Q. Didn't you say the other day that you didn't give them any instructions whatever about taking care of the surplus fish—isn't that what you said?

A. I told them that everybody's contract was made the same—all our contracts were made the same.

Q. In other words, this is what you have thought out since that time, on account of the previous testimony.

Mr. DONOHOE.—We object to that as argumentative. A. Not at all.

Q. Now, you say you haven't much recollection of Hunter's coming there to you on the 26th of July?

A. My recollection is not very clear that Hunter did come or what time he did come.

Q. You don't know anything about when the boat went out?

A. I know when Hunter came there, as soon as that boat could get over there, it went over; as soon as I was told there was fish over there, our boat went over.

Q. How many traps did you say you have up and down the inlet? A. We have about eleven.

Q. And you have these two independent traps on the east side? A. On the west side.

Q. Yes, the west side. And the Kalgin Island trap which is practically on the west side?

(Testimony of Charles H. Williams.)

A. Yes, that is west.

Q. That is your own? A. Yes.

Q. That would be twelve traps of your own?

A. No, eleven—the Kalgin Island is included.

Q. How far north is your upper trap, your northern trap, on the west side, from the one that is furthermost south on the eastern side—how much further is your highest trap up from the [98] lowest one, on the east coast?

A. I couldn't say, unless I measured it, but I think somewhere around sixty-five or seventy miles.

Q. How far is Kalgin Island from your cannery?

A. I think about twelve or fourteen miles.

Q. How far is it to Kuskatan, where this trap of March's, is?

A. About twenty-eight or thirty miles.

Q. From the cannery? A. From the cannery.

Q. The way you went?

A. I went from Kalgin—that would be about four and a half miles.

Q. And how far is the Howard & Pound trap from that?

A. I think that would be somewhere around twelve miles, something like that.

Q. How far altogether around that way, forty or fifty miles, 45?

A. About forty miles, something like that.

Q. How far was it then back to the cannery? Do they come back that way to the cannery?

A. It would be a little shorter distance to go straight over, you cut off some.

(Testimony of Charles H. Williams.)

Q. How long does it take them to go that distance?

A. It takes about eighteen to twenty hours or maybe twenty-four hours to make the run—they should be able to make it in eighteen, if the weather is anywhere decent.

Q. When the run of red fish comes in first, as a matter of fact you are a very busy man?

A. We haven't been very busy, I am sorry to say.

Q. I mean, when the run of red salmon is on?

A. Yes, we are busy, but it is very seldom we are anywhere near our capacity. [99]

Q. Aren't you a very busy man yourself?

A. No, I am not very busy.

Q. How long does the red run last?

A. Well, they may last three or four days, and they may run ten days.

Q. Isn't that the time when you hope to reap your rich harvest? A. You bet—that is right.

Q. What is the proportion of your red fish compared with the rest of the pack?

A. The red fish is way in the majority.

Q. What is your capacity?

A. We are fitted for 65,000 or 65 to 70,000.

Q. And what would be the proportion to the other?

A. That would be about 40,000 red out of that.

Q. Two-thirds? A. Yes, sir.

Q. You have two or three months to get the other fish and these 40,000 you have to get in three or four days?

A. No, we get the red fish all the season because the run is not very heavy.

(Testimony of Charles H. Williams.)

Q. Isn't it a very few you get most of the time?

A. Sometimes quite a few, sometimes pretty good—sometimes a few.

Q. How was it in 1913?

A. We had quite a few fish coming in the Inlet, on the eastern shore of the Inlet.

Q. Your recollection is pretty good now?

A. No, it is not very good.

Q. Now, is it not a fact that you did not know about the time the boats went out at all, they went out at random?

A. They have their regular runs, come in on one tide and go out on the next. [100]

Q. Do you know the day the boat went over to Kuskutan in July, before the red run came on?

A. It was supposed to be on that run.

Q. Do you know, of your own personal knowledge?

A. Well, that is all I can recollect—I don't know that the boat was broken down or that he made any other runs.

Q. Do you know about the run—do you know when he went over there from April to July 28th?

A. No, I couldn't state any date.

Q. You don't know whether it went over on July 28th? A. I do not.

Q. Or afterwards?

A. No, I do not, any date—he went over there, but what date I don't know.

Q. Now, you have eleven of your own traps to attend to when this big rush of red salmon comes on?

A. Yes.

(Testimony of Charles H. Williams.)

Q. When this tide of salmon comes in? A. Yes.

Q. Didn't you pay more attention to your own traps than you pay to any other trap?

A. Well, the boats are on that run and they attend to these traps—wherever we have fish we fish them.

Q. Don't you know the "Reporter" was taking fish from your other traps?

A. He wouldn't be sent to any other trap unless—

Q. Do you know he was not? A. No, I do not.

Q. What did you furnish in the way of gear?

A. Well, we furnished guy wire.

Q. How much? **[101]**

A. I could give you about the average that would be required for that kind of a trap.

The COURT.—The testimony of your own witness is uncontradicted here in that regard—that might save time.

Mr. MUNLY.—I want to get at the cost; he says he had no interest in this trap.

The COURT.—You might ask him what the total value of the material furnished was, if he knows.

Q. Do you know the cost? A. I do not.

Q. You have the management of that cannery?

A. I have.

Q. You said you were not very busy a while ago—didn't you look after the books, too?

A. It is a small item.

Q. Don't you know that each coil of this wire—if there were eight coils furnished that it would cost in the open market eighty or ninety dollars, this woven web for trap? A. I think it would.

(Testimony of Charles H. Williams.)

Q. Don't you know that the cost of the guy wire would be upwards, or about the same thing?

A. I don't think it would be quite as high as the netting—it takes about four coils of guy wire for a little trap of that kind.

Q. How about the cost of the webbing?

A. The webbing was very old webbing, such as we couldn't use any further in our traps.

Q. Do you recollect that? You didn't furnish it?

A. Yes, I knew that to be a fact.

Q. How do you know?

A. Because that was the instructions, they couldn't give anything else. **[102]**

Q. You didn't furnish it at all, of your own personal knowledge?

A. I didn't go and put it in the scow.

Q. Wasn't the cost, at least, over $200? Of the material that was furnished, nails and wire and all the material? A. It might run up to $200.

Q. So you had some interest in it?

A. That is an awful small item in a big cannery.

Q. But you had an interest in that trap to that extent?

A. We gave this gear to these men, turned it over to them—it was theirs when they got it.

Q. And they were to turn over all their fish to you?

A. They were to turn the fish over to me.

Q. Not to the Northwestern or any other one?

A. No, I don't think so.

Q. They couldn't turn their fish over to any other cannery?

(Testimony of Charles H. Williams.)

A. No, they could take care of it, turn it over to themselves.

Q. Did you see that receipt of Captain Christiansen—did you see about some receipt that Captain Christiansen told about, a record of that receipt, for two thousand fish?

A. I didn't see any receipt, no.

Q. Did Captain Christiansen tell you that there was 2,000 fish there on the 28th day of July, 1913?

A. I have no recollection of his telling about that.

Q. Did he tell you that there was some fish over there that he didn't take, over to the cannery?

A. Well, I asked him when he came—he didn't have any fish, and I asked him how it was he didn't have any fish and he said the fish was spoiled—that is all the conversation I had with him about it.

Q. Did he state the number?

A. He didn't state the number. [103]

Q. Did he say anything about a receipt? A. No.

Q. Did he tell you about any subsequent visits there, that is, later on—did he tell you about visiting the trap again?

Mr. DONOHOE.—We object to that as not proper cross-examination and as seeking to establish a waste of fish at a date subsequent to the date elected by the Government as the date on which they will stand.

Objection overruled. Defendant allowed an exception.

Q. Did he tell you there was any other fish destroyed there?

A. No, he didn't tell me anything about any fish

(Testimony of Charles H. Williams.)

being destroyed there.

Q. Did he tell you he had any fish at that trap at Kuskatan after the 28th of July?

Same objection. Objection overruled. Defendant allowed an exception to the ruling.

A. It was his regular run—if he went out with the steamer he must make that run.

Q. I mean, of your personal knowledge?

A. No, I was not on the boat, I couldn't say; I only got the captain's word for it, that he made that run.

Q. As a matter of fact, didn't you pay a couple of visits to this trap?

A. I was over there and stopped once and once passed through there—there was nothing doing at that time—they had no fish and nobody came out.

Q. That wasn't during the run?

A. It was during the fishing season.

Q. It was not during the red run?

A. It was some time in July. [104]

Q. What part of July?

A. I should say the middle of July.

Q. Didn't you tell them at that time to get busy and get all the fish they could for you?

A. That was during the king salmon season; the trap broke down at that time.

Q. Did you ever say to them at any time or make any arrangement with them, about drying or smoking or otherwise using any surplus salmon?

A. Just to take care of it—just to take care of it, that is the only words I used—you have to take care of the fish yourselves, any fish we cannot take.

(Testimony of Charles H. Williams.)

Q. Did you say anything about that before?

A. I don't think you asked me.

Q. You never said a word about drying or smoking?

A. No, I didn't mention that.

Q. When you were over there at that time—did you make any inquiries as to whether they had any facilities or means or opportunities for doing that?

A. No, I did not—I took their word for it that they would do it.

Q. You didn't make any inquiry at all as to when the red fish would come on? A. I did not.

Q. You let them run their trap as they pleased?

A. Yes, I had no jurisdiction over that.

(By Mr. DIMOND.)

Q. Did you ever have an over-supply of fish at the cannery, greater than your capacity, during the summer of 1913? A. No. [105]

Q. Did you ever at any time, either on the 28th day of April, or at any other date, tell Hunter and March that you would take all the fish they would catch at that trap? A. No.

Q. Do you recollect the date that you were over at the trap? A. No, I do not.

Q. Are you sure it was in the salmon season?

A. Yes, sir.

Q. And that is the day you made the remark to them?

A. Yes, their trap was a little out of order and I told them they had better get busy, if they wanted to make any money.

Witness excused. [106]

Testimony of O. S. Christiansen, for Defendant.

O. S. CHRISTIANSEN, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. DIMOND.)

Q. What is your name? A. O. S. Christiansen.

Q. What is your occupation?

A. Seaman, sailor.

Q. Where were you in 1913, the summer of 1913?

A. I was master of the steamer "Reporter" in Cook Inlet.

Q. In whose employ were you?

A. For the Alaska Packers Association.

Q. The Alaska Packers Association?

A. Yes, sir.

Q. What were your duties at that time?

A. My duty was to pilot the boat around, tow lighters and bring the men around to their stations and furnish them with the materials and one thing and another, and bring fish to the cannery.

Q. Did you pack fish in the boat itself or tow lighters?

A. Sometimes we towed lighters, but if there were not many fish, we packed them in the boat.

Q. You are familiar with this trap operated by March and Hunter in 1913, at Kuskatan?

A. Yes, sir.

Q. Did you call there frequently?

A. Yes, we called there every second day.

Q. Every second day?

A. Yes, when we started in to fish.

(Testimony of O. S. Christiansen.)

Q. Do you recollect how many times you were there during the month of July, previous to the 20th of July? A. No, I do not. [107]

Q. Do you know whether you called every second day in July or not?

A. No, I didn't call every second day in July.

Q. Why not?

A. Well, for some reason—there was no fish in the first part of July.

Q. The king salmon season was over at that time?

A. Yes, sir.

Q. And the reds had not commenced to run?

A. No.

Q. When were you at this trap in July previous to the 28th, before the 28th, when were you at this particular trap, about what time, if you don't know the exact date?

A. Well, it might be somewhere around the 18th.

Q. Whom did you see there at that time, Hunter or March, or both of them?

A. It seems to me they were both there at that time,—I think.

Q. Did you have any conversation with them at that time? A. No, not much.

Q. When were you at the trap next after that, about what time?

A. Well, it must have been on the 27th of July.

Q. Are you sure of that?

A. Well, I am not sure, I don't recollect the date exactly.

Q. You couldn't tell, it might be earlier or later?

(Testimony of O. S. Christiansen.)

A. Yes, but it was about that time.

Q. How did you come to go over there?

A. Well, we got notice at the cannery that there was some fish over there.

Q. Who was at the trap at that time or whom did you see there?

A. When I came there Charley March was there.

Q. Was there any fish there?

A. Well, they had about two thousand on the scow.

[108]

Q. How could you tell there was 2,000?

A. We can pretty nearly tell and that is what Charley March said, there was two thousand.

Q. Did you take those fish?

A. No, I couldn't take them, because they were too old.

Q. How could you tell they were too old?

A. Well, the smell was enough for me.

Q. Did you examine the fish? Did you go close to the scow?

A. Yes, I went close to the scow and looked at them.

Q. How long have you been up in and around Cook Inlet engaged in fishing or in connection with the fish industry? A. Twenty-nine years.

Q. You have been in the fish business all that time, in some capacity or other?

A. Yes, the last fifteen years I have been master of the steamer "Reporter."

Q. How old would you say those fish were that you

(Testimony of O. S. Christiansen.)

observed, those two thousand that you observed in the scow?

Mr. MUNLY.—We object to that, testifying about the age of the fish.

The COURT.—He can give his opinion.

The WITNESS.—According to stories I heard they were about—

The COURT.—That is not the question.

The WITNESS.—They were over two days old.

Mr. DIMOND.—That is all. [109]

Cross-examination.

(By Mr. MUNLY.)

Q. Now, Captain, you started in on the "Reporter" during the month of May to go to that trap at Kuskatan, to call at that trap, every second day?

A. Yes, every second day.

Q. And you continued that for how long?

A. We continued that up to about the first part of July, some time.

Q. You took all the salmon they had there?

A. Yes, sir.

Q. Glad to get all the salmon you could?

A. Yes, sir.

Q. Now you say the time previous to July 28th that you called was about July 18th—that you called at the trap? A. Yes.

Q. As an old fisherman up there, didn't you expect the run of fish to be coming at any time?

A. Yes, they were expected to come at any time, but in general they come first on the eastern shore, before they get up there.

(Testimony of O. S. Christiansen.)

Q. When the run began, didn't you run the "Reporter" down to the other traps, the company's traps, and take fish from the other traps? A. No.

Q. Didn't you visit any other trap? A. I did.

Q. What traps did you visit?

A. Because one of the boats broke down.

Q. And so you were put on the run for the other traps?

A. Well, I had to do it—I had to go to the traps for the cannery.

Q. That is the reason you could not go over there until the 28th, to the other trap, the Kuskatan trap?

[110] A. Yes, sir.

Q. It was the 28th you got there? That is the way you testified on your previous testimony?

A. Yes, sir.

Q. There was 2,000 fish there that day?

A. Yes, sir.

Q. You gave your receipt for 2,000 fish?

A. I did.

Q. How close did you get to those fish?

A. Well, I was alongside the scow with the steamer.

Q. How close to the scow did you get?

A. Alongside the scow.

Q. But you took no fish away? A. No.

Q. As a matter of fact, when the red fish run—don't they run every day?

A. Yes, they run every day.

Q. There ought to have been some other fish there?

A. They didn't have any other fish at that time—

(Testimony of O. S. Christiansen.)

of course if they had fish I would have taken them.

Q. But you didn't make any close examination?

A. I didn't go down in the scow,—of course not.

Q. Didn't March & Hunter say they wanted to sell all their fish? A. Yes.

Q. Weren't they anxious to make money?

A. They were.

Q. Anxious to sell their fish? A. Yes.

Q. But you wouldn't take the fish from them?

A. That is why I gave them that receipt. I didn't have an order from Superintendent Williams to do it; he said, Go over there [111] and get the good fish and receipt for it, but don't bring any bad ones.

Q. What was the next visit you paid—did you pay a visit the next day or the next—when did you go over to the trap after the 28th?

A. I don't remember now what date it was.

Q. Was it the fifth or the third or when?

Mr. DONOHOE.—We object to that because it is not cross-examination. The witness testified on direct examination there was nothing occurred after the 28th.

Objection overruled. Defendant excepts.

Q. You don't know when you went over there the next time?

A. No, I don't remember the date—it was some days afterwards,—how many days it was I don't know.

Q. In the meantime weren't you still taking fish from the other traps belonging to the company, on the "Reporter"?

(Testimony of O. S. Christiansen.)

A. Yes, we took fish from the Kalgin Island trap and went up I think to the Howard & Pound trap.

Q. Didn't you take some from the upper trap belonging to the company, the trap that is way up north there, on the eastern side?

A. Yes, we went by there sometimes—that is what we call Natisko; we went there sometimes, not all the time.

Q. Didn't you take some sometimes?

A. Yes, sir.

Q. Didn't you take from some of the other company traps besides that?

A. No, not down on the eastern shore, because there were other boats running there.

Q. Now, Captain, when was the last time that you called at the trap? **[112]**

Mr. DONOHOE.—We object to that question on the ground that it is not proper cross-examination and on the further ground that it is tending to establish a liability against this company or establish an alleged collateral crime, after the date on which the Government has elected to stand in this indictment.

Objection overruled. Defendant allowed an exception.

Q. Do you remember the last time you visited the trap at Kuskatan?

A. The last time at Kuskatan—you mean for fish?

Q. Yes.

A. I don't remember the date, when it was, but I know they didn't have many any way and they figured on breaking up the trap.

(Testimony of O. S. Christiansen.)

Q. Didn't they have several hundred fish there?

A. Yes, there was several hundred, something like that.

Q. And you didn't take them?

A. We took them if they were good, sure.

Q. Did you take any that time—did you take any the last time?

A. I have forgotten now—if they had any I took them all right, if they were good.

(By Mr. DIMOND.)

Q. When you were at the trap and these 2,000 fish were there that you spoke of, who was at the trap?

A. There was Charley March.

Q. Was there any native there?

A. No, I didn't notice them.

Q. Did you have any conversation with Charley March when you were there at this time and found those 2,000 fish there?

A. Not very much—he asked me what he was going to do and I said [113] I don't know myself—I gave him the receipt and I said it might be remedied afterwards; what he was going to do with the fish I said I didn't know.

Q. Did you have any other conversation with him?

A. No; I didn't stay there very long.

Q. (By Mr. MUNLY.) Did you notify him at that time not to fish any more?

A. No, I couldn't do that.

Q. (By Mr. DIMOND.) Did Mr. March say anything about whether he was going to fish any more or not?

(Testimony of O. S. Christiansen.)

A. Well, he says, "I don't know if it is much use to fish any longer if it keeps on going this way," but he keeps on fishing a little anyway.

Witness excused. [114]

Testimony of James S. Lyman, for Defendant.

JAMES S. LYMAN, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. DONOHOE.)

Q. What is your name? A. James S. Lyman.

Q. You occupy a government position in Alaska?

A. I am the representative of the Bureau of Fisheries.

Q. How long have you been in that capacity?

A. I have been associated with the Bureau since 1911, but in the capacity I am now in, since 1914.

Q. It is part of your duty to visit the several fish-traps in this section of the Territory and generally overlook the fishing business here?

A. It has been and is at present, where traps are found.

Q. You have made somewhat a study of curing fish and of drying and other means of preserving fish, and also by observation?

A. I would hardly say I had made a study of it—it has only come to hand in the course of the last year, in observations I was carrying on in the Interior of Alaska, the Copper River Valley—and at that time I had occasion to observe the methods of drying.

(Testimony of James S. Lyman.)

Q. You heard the testimony here, I believe, of Mr. March that he had two thousand fish in the scow out here at Kuskatan on the 28th day of July, 1913—I will ask you, from your experience, what is your opinion as to whether or not March and Hunter could have sun-dried those salmon so as to cure them for dog feed?

Mr. MUNLY.—We object to that as having no bearing whatever on this case—it is not shown to be part of the agreement.

By the COURT.—It is a question for the jury.

Objection overruled. Plaintiff allowed an exception. [115]

A. Well, that would depend upon varying circumstances. Taking their testimony as evidence, it might be said that there was no room for the drying of those fish; not being acquainted with the spot in question, I wouldn't be able to answer that question thoroughly. As to the possibilities of drying salmon where there is space and means provided, I presume it would be possible, but as to this particular case, I wouldn't hardly be in position to testify.

Q. From your knowledge of the situation what would you say as to the extent of preparations necessary to sun-dry those fish?

Mr. MUNLY.—We object to that—they have laid no foundation to show that this witness has any knowledge whatever of the conditions up there.

By the COURT.—He may answer.

A. I am not really in a position to testify on that particular point, because there are several proposi-

(Testimony of James S. Lyman.)

tions that enter into it, that would have to be known by actual knowledge; in other words, you would have to know what exact preparations were at hand for facilitating the work.

Q. What would be the preparations necessary to sun-dry salmon?

A. Well ordinarily, if you had a beach and a place to build a rack and the salmon were right there, the preparations would be rather simple. In this particular case it would all depend on whether they had proper boats to get the salmon and what quantity of salmon they had to dry.

Q. Basing it on two thousand salmon?

A. As I said before, I would have to know the conditions that obtained there before I could testify, because I could qualify in no way as an expert in this particular business.

Q. I will ask you if on last Saturday afternoon, in the Buffet Saloon, in the Town of Valdez, you didn't tell me that you [116] had listened to the testimony of Hunter and March in the previous trial and you were fully convinced that they could easily have taken care of those salmon by drying, or words to that effect?

Mr. MUNLY.—We object to that—it is an attempt to impeach their own witness.

Objection sustained. Defendant allowed an exception.

(By Mr. MUNLY.)

Q. You don't know anything about the conditions at Kuskatan at all? A. Not at all.

(Testimony of James S. Lyman.)

Q. Have you ever visited Kuskatan?

A. Never visited there.

Witness excused.

DEFENDANT RESTS.

Mr. DIMOND.—At this time we wish to renew our motion for an instructed verdict of Not Guilty, on the same grounds as originally moved, at the close of the Government's case.

Motion denied. Defendant excepts.

After argument of counsel the Court delivered his instructions to the jury, as follows: [117]

Instructions of the Court.

Gentlemen of the Jury:

In this case the defendant, the Alaska Packers Association, a corporation, is charged by the indictment with wantonly wasting and destroying salmon in the waters of Cook Inlet, in the Third Division of Alaska, on the 30th day of July, 1913.

2.

Section 266 of the Compiled Laws of Alaska provides that it shall be unlawful for any person, company or corporation wantonly to waste or destroy salmon, or other food fishes, taken or caught in any of the waters of Alaska.

You are instructed that while intent is an essential ingredient of every crime and that no crime can be committed without the intent so to do, still everyone is presumed to know and to intend the necessary, natural and probable consequences of his acts.

The word "Wantonly" as used in this statute means without excuse or justification; having a reck-

less disregard of consequences; heedless of results and the rights of others.

The words "waste" and "destroy" are used in this statute in their ordinary significance—to suffer or permit to go to waste and be destroyed; not saved or put to any good or useful purpose.

3.

Section 265, Compiled Laws of Alaska, reads as follows:

It shall be unlawful to can or salt for sale for food any salmon more than forty-eight hours after it has been killed. [118]

4.

It is admitted that the defendant is a corporation organized under the laws of the State of California, and you are instructed that a corporation acts only through some officer, agent, representative or person, and you are further instructed that the witness Williams is admitted to be the superintendent of said defendant corporation, and as such, his acts and agreements in relation to the trap and fish testified to in this case are binding on said defendant company.

At the request of the defendant I give you the four instructions following:

Defendant's Instruction A.

The indictment in this case charges the defendant with destroying a large number of salmon. Now you are instructed that before the defendant can be convicted of the charge it must be proven to your satisfaction, beyond all reasonable doubt, that the defendant unlawfully and wantonly wasted or de-

stroyed a large number of salmon, that is, a considerable number. To sustain a conviction of the defendant it is not sufficient to prove that some salmon were wasted or destroyed, such as might incidentally be wasted and destroyed in the operation of a large cannery.

Defendant's Instruction B.

This instruction is given subject to the qualifications mentioned in Instruction Number 8.

You are instructed that if you believe from the evidence that at the time the defendant corporation supplied Hunter and March with a portion of the fishing gear for the construction of [119] the trap at West Foreland, that Captain Williams acting on behalf of said corporation stated to Hunter that in case the company did not take all of the fish that would be caught in the trap that he, Hunter, must take care of the fish, either by salting or drying them and not permit them to spoil, then you must find the defendant not guilty.

Defendant's Instruction C.

This instruction is given subject to the qualifications mentioned in Instruction Number 8.

I instruct you that if you believe from the evidence that at the time the defendant corporation delivered to Hunter a portion of the gear used in connection with the fishing-trap in question that it was understood between Captain Williams, acting for the defendant corporation, and William Hunter, that in case the company's boat did not call for any fish within the time allowed by law for canning fish after they were taken from the water, that Hunter and

March were to dry or salt the fish for their own account, then you must find the defendant Not Guilty.

As I have stated, these last two instructions that I have read to you are to be read in connection with Instruction Number 8 as I will read it to you hereafter.

Defendant's Instruction D.

The defendant in this case is a corporation, but you are cautioned not to allow such fact to prejudice or bias you in this case either in favor of or against the defendant. You are instructed to consider the evidence in this case in the same manner as you would if the defendant were an individual. [120]

5.

The Jury are instructed that although the indictment in this case charges the unlawful destruction of salmon to have been committed on the 30th day of July, 1913, the plaintiff has elected to stand for a conviction upon another date, to wit, the 28th day of July, 1913, and you are instructed that the plaintiff can do this, and you are to consider the charge as though the indictment charged the commission of the offense to have occurred on said 28th day of July, 1913.

There has been some evidence introduced of other like offenses on other dates. The evidence was admitted only as showing a long course of conduct and as it may tend to throw light on and explain the whole situation, or transaction, between the defendant and the prosecuting witness, or the witness March, and for the purpose of showing the intent, purpose or motive of the defendant, whether wanton, reckless

or otherwise, as concerns the offense charged to have been committed on the said 28th day of July, 1913.

And you are instructed that you will not consider the evidence of other offenses than that alleged to have been committed on the 28th day of July, 1913, as proving the alleged offense, if you find it was committed on said last-named date, but only as such evidence may tend to show motive, intent and purpose as above set forth. [121]

7.

You are instructed that if you believe from the evidence, beyond a reasonable doubt, that the defendant company made an agreement or arrangement with the witness March, or March and Hunter, to call for and take all salmon caught in said trap near Kuskatan, during the fishing season of 1913, and that said defendant recklessly and wantonly (as defined to you in these instructions) failed and neglected to call for or take said fish, and thereby suffered and permitted said salmon to be wasted and destroyed, then you should find the defendant guilty as charged in the indictment.

If, however, you believe from the evidence that the defendant company did not agree to call for all the salmon during the fishing season of 1913, at said trap near Kuskatan, and take the same from the witness March, or March and Hunter, then you should find the defendant Not Guilty.

The last two paragraphs are to be considered by you in connection with the following statement of the law concerning contracts for the trapping or catching of salmon, to wit:

8.

A cannery company may lawfully enter into a contract with any person to take all or any part of the salmon caught in a trap or otherwise by such person, provided such person has opportunity, means or facilities for taking care of, using or disposing of any portion of the salmon remaining after the cannery company has taken such salmon as it wants, or such cannery company has no reason to doubt such is the case; but such contract cannot lawfully be made so as to relieve such cannery company from liability, if said cannery company, in making said contract, has knowledge that such person is using a trap which during the [122] run of salmon will catch large numbers of salmon each tide, and such person has no means, opportunity or facilities for using or disposing of said salmon, except to the cannery company entering into said agreement, by loading said salmon on boats furnished by such cannery company, and that if such cannery company does not call for said salmon with its boats, said salmon, or a considerable quantity thereof, will have to be thrown away, wasted and destroyed, and so knowing, such cannery company fails to send for the salmon and a considerable quantity thereof has to be thrown away, wasted and destroyed in consequence.

9.

In this case, as in all criminal cases, the jury and the Judge of the court have separate functions to perform. It is your duty to hear all the evidence, all of which is addressed to you, and thereupon to

decide and determine the questions of fact arising from the evidence. It is the duty of the Judge of this court to decide the questions of law involved in the trial of the case, and the law makes it your duty to accept as law what is laid down as such by the Court in these instructions. But your power of judging the effect of the evidence is not arbitary, but to be exercised with legal discretion and in subordination to the rules of evidence.

10.

Your duty to society and this defendant obligates each of you to give your earnest and careful attention and consideration to every feature of the case now on trial before you, so that the defendant may not be unjustly convicted nor wrongfully acquitted. [123] Under the solemnity of your oaths as jurors you must consider all of the evidence in the case under the law given to you by the Court in these ininstructions; and upon the law and evidence you must reach, if you can, a just verdict, which the law and the rights of the defendant demand of you; and in determining the guilt or innocence of the defendant it becomes your duty to accept the law of the case as given to you by the Court in these instructions.

11.

It is your duty to give to the testimony of each and all of the witnesses such credit as you consider their testimony justly entitled to receive; and in doing so, you should not regard the remarks or expressions of counsel, unless as the same are in conformity with the facts proved, or are reasonably deducible from

such facts and the law as given to you in these instructions.

12.

You are instructed that the evidence is to be estimated not only by its own intrinsic weight, but also according to the testimony which it is within the power of one side to produce and of the other side to contradict; and, therefore, if the weaker and less satisfying evidence is produced when it appears that it was within the power of the party offering the same to produce stronger and more satisfying evidence, such evidence, if so offered, should be viewed with distrust. [124]

13.

You are instructed that you should not consider any evidence sought to be introduced but excluded by the Court, nor should you consider any evidence that has been stricken from the record by the Court, nor should you consider in reaching your verdict any knowledge or information known to you not derived from the evidence as given by the witnesses upon the witness-stand.

You should not allow prejudice or sympathy to swerve you in reaching a verdict according to the evidence and the law as given to you by the Court. Whatever verdict is warranted under the evidence and the instructions of the Court, you should return, as you have sworn so to do.

The character and degree of the punishment is to be determined by the Court, within the limits fixed by law, and you are instructed that you should not

consider the matter of the punishment in making up your verdict.

14.

You are instructed that you are the sole judges of the credibility of the witnesses appearing before you, and of the reasonableness of their testimony, and of the weight to be given their evidence.

The law also makes it my duty to instruct you that you are not bound to find in conformity with the testimony of any number of witnesses which does not produce conviction in your minds, against a less number, or against a presumption of other evidence, satisfying your minds. You are also instructed that a witness who is wilfully false in one part of his testimony may be distrusted by you [125] in other parts. If you find that any witness in this case has testified falsely in one part of his testimony, you are at liberty to reject all or any part of his testimony, but you are not bound to do so. You may reject the false part and give such weight to other parts as you think they are entitled to receive.

15.

This defendant is presumed to be innocent of the charge against it until it is proved to be guilty beyond a reasonable doubt by the evidence produced in this case and submitted to you. This presumption of innocence is a right guaranteed to the defendant by law and remains with it, and should be given full force and effect by you, until such time in the progress of this case as you are satisfied of its guilt from the evidence beyond a reasonable doubt.

You are instructed that the indictment in this case

is not to be taken or considered by you as any evidence against the defendant, but as merely a charge or allegation brought against it.

16.

The term "reasonable doubt" as defined by the law and as used in these instructions means that state of the case which, after a careful comparison and consideration of all the evidence in the case, leaves the minds of the jury in that condition that they cannot feel an abiding conviction, amounting to a moral certainty, of the truth of the charge. The term "reasonable doubt" does not mean every doubt but such a doubt must be actual and substantial, as contradistinguished from some vague apprehension, and [126] must arise from the evidence, or from the want of evidence, or from such sources. A reasonable doubt is not a mere whim, but is such a doubt as arises from a careful and honest consideration of all the evidence in the case; and the evidence is sufficient to remove all reasonable doubt when it convinces the judgment of ordinarily prudent men of the truth of a proposition with such force that they would act upon the conviction without hesitancy in their own most important affairs. Proof beyond all reasonable doubt does not mean proof beyond every doubt. Absolute certainty in the proof of a crime is rarely obtainable, and never required.

17.

I hand you herewith two forms of verdict, one finding the defendant guilty as charged in the indictment, and the other finding the defendant not guilty.

You may take with you these instructions for your guidance, and when you have unanimously agreed upon your verdict, you will sign the one you find, by your foreman, and return it into court; the other you will destroy.

Defendant's Exceptions to Instructions of Court to Jury.

Mr. DIMOND.—At this time, before the jury retires, the defendant wishes to except to the Court's Instruction Number 2 as given, on the ground that the definition of the word "wantonly" is not sufficient, in that it does not include the element of perversity, mischievous intent and turpitude.

The defendant excepts to Instruction Numbered Defendant's Instruction B, which defendant requested be given to the jury as our Instruction Number 9, in that it is given subject to [127] the qualifications mentioned in the Court's Instruction Number 8.

The defenant excepts to Instruction Numbered Defendant's Iustruction C, given by the Court to the jury, and which was submitted to the Court by the defendant and asked to be given to the jury as defendant's Instruction Number 10 in that it also is given by the Court subject to the qualifications of Instruction Number 8.

The defendant excepts to the Court's Instruction Number 5 given to the jury in that it admits evidence of collateral crimes, or alleged collateral crimes, as the first ground, and on the second ground, that some of these alleged crimes were subsequent to the date, the 26th day of July, 1913, which the defendant

claims is the selection by law of the date upon which the plaintiff should stand to prove its case; and upon the further ground that some of them are subsequent to the 28th day of July, 1913, the date finally elected by the Government; and on the further ground that the language of the instruction is that it is given as showing—that the evidence was admitted as showing or tending to show a long course of conduct on the part of the defendant, etc.

The defendant also excepts to the Court's Instruction Number 7, the last part of Number 7, as follows:—"The last two paragraphs are to be considered by you in connection with the following statement of the law concerning contracts for the trapping or catching of salmon, to wit:" for the reason that the statement of the law here referred to, that is, Number 8 of the Court's instructions to the jury, is not the law of this case and is contrary to the law. **[128]**

The defendant also excepts to the Court's Instruction Number 8 given to the jury, that particular part of it as follows:

> "Provided such person has opportunity, means or facilities for taking care of, using or disposing of any portion of the salmon remaining after the cannery company has taken such salmon as it wants, or such cannery company has no reason to doubt such is the case; but such contract *contract* cannot lawfully be made so as to relieve such cannery company from liability, if said cannery company, in making said contract, has knowledge that such person is

using a trap which during the run of salmon will catch large numbers of salmon each tide, and such person has no means, opportunity or facilities for using or disposing of said salmon, except to the cannery company entering into said agreement, by loading said salmon on boats furnished by such cannery company, and that if such cannery company does not call for said salmon with its boats, said salmon, or a considerable quantity thereof, will have to be thrown away, wasted and destroyed, and so knowing, such cannery company fails to send for the salmon and a considerable quantity thereof has to be thrown away wasted and destroyed in consequence."

On the ground that said instruction is not the law on this case and is contrary to the law governing the defendant's liability in this case, for the reason that it is shown by the evidence that the Government's two witnesses, William Hunter and Hayward March had full and complete control and management of the trap in question; that they could have opened the door to the pot in the fish-trap and thereby permitted the fish to escape; that it was the duty of the witnesses William Hunter and Hayward March to have either closed the entrance of the trap, so that no fish could enter or to have opened the door to the pot, so that the fish could have passed through the trap and escaped to sea again, or it was the duty of said two witnesses when the defendant company's boat failed to call for the fish to have dried or salted or otherwise disposed of the fish that

were taken in their trap, for a beneficial purpose. It also appears from the testimony that the defendant company had no power, right or control over the management [129] of said trap and could not have closed said trap so that the fish could not enter, nor could it open the door of the pot of the trap so that the salmon could pass through and escape to sea. In other words, it appears from the testimony that the defendant company had no power or control over said trap so that it could in any manner limit the amount of fish caught in said trap.

It further appears from the evidence that the witnesses, William Hunter and Hayward March, the owners of said trap, were neither employees nor agents of the defendant company, but were independent contractors and that thereby the witnesses, William Hunter and Hayward March, assumed the responsibility for all fish taken in said trap.

The defendant excepts to the refusal of the Court to give defendant's requested Instruction number 2, requested by defendant to be given to the jury, as follows:—

> "You are instructed that before you will be warranted in convicting this defendant upon the indictment herein it will be necessary that the Government shall have proven to your satisfaction, beyond all reasonable doubt:—(first) That a considerable number of salmon were wasted and destroyed on the day and at the place named in the indictment; (second) That the defendant wasted and destroyed the salmon at the time and place charged; and (third) If

you shall find that the salmon were wasted and destroyed by the defendant, before you can convict you must also find to your satisfaction, beyond all reasonable doubt, that such wasting and destruction by the defendant was done unlawfully and wantonly."

We also except to the refusal of the Court to give defendant's requested Instruction Number 3, requested by defendant to be given to the jury, as follows:

"You are further charged that the word 'wanton' when used in a statute making criminal the unlawful and wanton killing of animals and fish imports that the act is directed against the animals or fish themselves as distinguished [130] from a wilful killing with the intent to injure the owner or violating the law. The act must be done intentionally, by design, without excuse, and under circumstances evidencing lawless and destructive spirit."

Defendant also excepts to the refusal of the Court to give Instruction Number 4 requested by defendant, as follows:

"You are instructed that the word "unlawfully" implies that an act is not done in the manner as allowed or required by law; but the term 'wantonly' implies turpitude and that the act was done for a wilful and wicked purpose."

Defendant also excepts to the refusal of the Court to give Instruction Number 5 requested by defendant, as follows:

"You are further charged that the word 'turpitude' as used in the last instruction means inherent baseness or vileness of principle, words or action; shameful; wicked; depraved. Moral turpitude is a matter done contrary to justice, honesty, principle or good morals."

Defendant also excepts to the refusal of the Court to give Instruction Number 6 requested by defendant, as follows:

"You are charged that before you can find an act to have been done wantonly, you must be satisfied beyond all reasonable doubt that it was committed perversely, recklessly, without excuse, and without regard to the rights of others and without regard to the law. In other words, such act must have been with mischievous intent, although the matter need not necessarily have been done with settled malice. Therefore, before you will be justified in returning a verdict of guilty in the case before you, you must find beyond all reasonable doubt that salmon were wasted and destroyed at the time and place as charged in the indictment, and also that such waste and destruction was done by the defendant recklessly, without excuse and without regard to the rights of others, perversely, with mischievous intent, and under such circumstances as to imply turpitude."

Defendant also excepts to the refusal of the Court to give Instruction Number 7 as requested by defendant, as follows:

"I instruct you that the defendant in this action is [131] not brought to the bar of this court to answer to the charge of merely destroying salmon. The laws of the United States do not punish for the mere loss of fish. The law recognizes the fact that in the operation of a business such as a cannery, some waste of food fish will necessarily occur and that such waste and destruction are inevitable. The law, therefore, wisely refuses to punish for things which cannot be avoided. But what the law does prohibit and punish is not the waste or destruction of food fish, but the wanton and reckless waste or destruction thereof. And you must return a verdict of not guilty herein even if you shall be satisfied beyond all reasonable doubt, that some salmon were lost in the West Foreland trap, or were wasted after being taken from the trap, unless you shall also believe beyond all reasonable doubt that the defendant, or some one under its control and acting for it, wantonly and unlawfully destroyed the said fish; and the burden of proving these charges beyond all reasonable doubt rests upon the Government."

Now, coming to our Instruction Number 9, the defendant excepts to the refusal of the Court to give Instruction #9 without qualification, it being given by the Court as the Court's Instruction B, but subject to the qualification of Instruction #8 of the Court.

We ask a like exception to the refusal of the Court to give our requested Instruction #10, which was

given as Court's Instruction C to the jury, but with the qualification that it was given subject to the provisions of Instruction #8.

The defendant excepts to the refusal of the Court to give Instruction Number 11 requested by defendant, as follows:

> "I instruct you that before you are warranted in finding the defendant corporation guilty of the crime charged in the indictment, you must find beyond a reasonable doubt that the defendant, at the time it furnished a part of the gear for the construction of the trap in question, then and there agreed in all events to take and receive from Hunter and March all the fish caught in that trap during the fishing season of 1913." **[132]**

The defendant excepts to the refusal of the Court to give Instruction #12 requested by defendant, as follows:

> "I instruct you that the evidence in this case shows that the fish-trap at West Foreland where the fish alleged to have been wasted in the year 1913, was operated and controlled by witnesses William Hunter and Hayward March and that the defendant company did not have any control over the management or operation of this trap, and unless you believe from the evidence, beyond all reasonable doubt, that the defendant company positively agreed with Hunter and March that it would take all the fish caught in this trap during the season of 1913, then you must find the defendant not guilty.

The defendant excepts to the refusal of the Court to give Instruction #13, requested by defendant, as follows:

> "You are instructed that even if you shall find beyond all reasonable doubt that a large number of salmon, which had been caught at the West Foreland trap of William Hunter and Hayward March, were wasted and destroyed, you will not be warranted in returning a verdict of guilty against the defendant unless you shall further find, beyond all reasonable doubt, that the defendant was the owner of the trap and responsible for its operation; or, that it was bound by virtue of some contract with Hunter and March to take all the fish caught in the trap, within such time after the same were caught as would prevent their waste or destruction; or, that Hunter and March were the agents or employees of the defendant, as those terms shall hereinafter be defined to you."

The defendant excepts to the refusal of the Court to give Instruction #14 requested by defendant, as follows:

> "I instruct you that even if you believe from the evidence that the defendant corporation agreed with Hunter and March to take all the salmon caught in the trap in question during the season of 1913 and that it failed to do so, and that, owing to its failure to take the salmon caught, witnesses Hunter and March threw the fish away and thereby they were wasted and destroyed, still if it were possible for Hunter

and March at the time the company refused to take the fish in question to have dried the fish, or otherwise have preserved them for a beneficial purpose, I instruct you that it was the duty of Hunter and March to have done so, and that this defendant was not criminally responsible for the act of Hunter and March in throwing away or wasting the salmon in question, and you must find the defendant not guilty." **[133]**

The defendant excepts to the refusal of the Court to give Instruction Number 15 requested by defendant, as follows:

"You are instructed that even if you find from the evidence, beyond all reasonable doubt, that the defendant company made an agreement, contract or arrangement with the witness Hunter, or the witness March, or both, or either of them, to call for and take all salmon caught in said trap near West Foreland, and that the defendant failed to call for and take all such salmon and that some of such salmon were thereupon wasted or destroyed, and that Hunter or March could have prevented such salmon from being wasted or destroyed by drying the same, or using them in some other lawful manner, you cannot find the defendant guilty."

The defendant excepts to the refusal of the Court to give Instruction #16 requested by defendant, as follows:

"I instruct you that if you believe from the evidence that witnesses, William Hunter and

Hayward March, had or exercised the control and management of the fishing-trap described in the indictment and testified to by the witnesses, that they, Hunter and March, were responsible for all fish caught in said trap until the same were sold and delivered to the defendant company, and that of any fish caught in this trap during the season of 1913 were destroyed or wasted contrary to law, before the same were destroyed or delivered to defendant company, then the defendant company cannot be legally convicted for such waste, regardless of any contract existing between Hunter and March and the defendant company, and you must therefore find the defendant not guilty."

Defendant excepts to the refusal of the Court to give Instruction #17 requested by defendant, as follows:

"You are instructed that the witnesses Hunter and March were in charge of the West Foreland trap, where it is alleged that a waste of salmon occurred, and that you cannot find the defendant guilty in this case unless you shall find beyond all reasonable doubt that the said Hunter and March, or either of them, in charge of said trap, were the employees or agents of the defendant corporation, and in that connection you are instructed that one is an employee or agent who is subject to the control or direction of the employer." [134]

The defendant excepts to the refusal of the Court

to give Instruction #18 requested by defendant, as follows:

> "An employee has been defined as one who works for an employer; a person working for a salary or services; a person employed; one who is engaged in the service of another; one whose time and skill are occupied in the business of his employer.
>
> An agent, as the term is used herein, is one who acts for another by the authority of that other; one who undertakes to transact the business or manage the affairs of another by authority or on account of such other."

The defendant excepts to the refusal of the Court to give Instruction #19 requested by defendant, as follows:

> "If you find from the evidence that Hunter and March had the exclusive right to manage and operate said trap as they might see fit, then you cannot find the defendant in this case guilty of the crime charged, for in that event, although there may have been a contract between Hunter and March and the defendant herein whereby the defendant agreed to take certain fish of Hunter and March, the latter were independent contractors."

The defendant excepts to the refusal of the Court to give Instruction #20 requested by defendant, as follows:

> "An independent contractor, as the term has been used in the foregoing instruction, is one

who contracts to do a specific piece of work, furnishing his own assistance and executing the work entirely in accordance with his own ideas, either in accordance with a plan previously given him by the person for whom the work is done, without being subject to the orders of the other in respect to details of the work. The general test by which it is determined whether a person is an independent contractor or an employee is, who has the general control of the work? Who has the right to direct what shall be done and how to do it?" **[135]**

The defendant excepts to the refusal of the Court to give Instruction #21 requested by defendant, as follows:

"You are further instructed that an indictment is merely a charging paper, and the fact that the indictment in this case charges the defendant with wasting and destroying fish, either many or few, is not to be taken by you as evidence in any way and is not to be construed by you as having any bearing upon the question of the guilt or innocence of defendant; nor is the fact that it is alleged that large numbers of salmon have been destroyed to be taken by you in any other way than as a mere charge or allegation. And you are cautioned that you must not allow the contents of the indictment to in any way bias or prejudice you in your deliberations of this case."

The defendant excepts to the refusal of the Court

to give Instruction #23 requested by defendant, as follows:

> "You are further instructed that the defendant is not required by law to prove that it is innocent, but the Government is required to prove to your satisfaction, beyond all reasonable doubt, that each and all of the material allegations in the indictment are true, as the term 'reasonable doubt' has been defined to you."

The defendant excepts to the refusal of the Court to give Instruction #24 requested by defendant, as follows:

> "I instruct you that under the laws of Alaska it is unlawful to can or salt for sale for food any salmon more than forty-eight hours after the same has been killed or taken from the water."

The defendant excepts to the refusal of the Court to give Instruction #25 requested by defendant, as follows:

> "I instruct you that if you find from the evidence, beyond all reasonable doubt, that the defendant corporation did unlawfully and wantonly waste or destroy salmon in large quantities, at the time and place alleged in the indictment, before you can find it gulity of the crime charged you must further find from all the testimony before you that there is testimony introduced at the trial of this cause, other than that of William Hunter and Hayward March, the two Government witnesses in this case, tending in some manner to corroborate the testimony of these two witnesses; and I instruct you that un-

der the testimony offered in this trial, should [136] you find the defendant corporation guilty of unlawfully and wantonly wasting salmon at the time and place alleged in the indictment, then said two witnesses, William Hunter and Hayward March, are accomplices of the defendant in said crime and you cannot find the defendant guilty on the testimony of such accomplices, uncorroborated by any other evidence tending to connect the defendant with the commission of the crime."

The defendant excepts to the refusal of the Court to give Instruction #26 requested by defendant, as follows:

"In its operation of its salmon cannery at Kasiloff the defendant in this action was governed by the provisions of the law known as the Act of June 30, 1906, commonly called the Food and Drugs Act, which provides, in part, as follows:

'That it shall be unlawful for any person to manufacture within any Territory or the District of Columbia any article of food * * * which is adulterated * * * within the meaning of this Act. * * * That for the purpose of this Act an article shall be deemed to be adulterated: * * * Sixth: If it consists in whole or in part of a filthy, decomposed, or putrid *anumak* or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not.'

Therefore, I instruct you that if the salmon in question alleged to have been wasted and destroyed had in any manner become decomposed before the defendant corporation could get them to its cannery at Kasiloff and can the same, then and in that event said defendant could not have canned said salmon without violating the law above quoted, regardless as to whether the salmon were killed forty-eight hours previously or not."

The defendant excepts to the refusal of the Court to give Instruction #27 requested by defendant, as follows:

"You are instructed that under the testimony offered by the Government in this case, it has elected to stand upon the 26th day of July, 1913, as the day on which it claims the alleged violation of law as appears in the indictment, was committed by the defendant corporation. You will, therefore, not consider, in arriving at your verdict, any of the testimony offered, tending to establish a waste or destruction of salmon on any date after the 26th day of July, 1913. And unless you are [137] satisfied, beyond a reasonable doubt, that the defendant corporation unlawfully and wantonly wasted or destroyed a large number of salmon on that date, you must find the defendant not guilty."

The defendant excepts to the refusal of the Court to give defendant's Requested Instruction #28, as requested by defendant, as follows:

"You are instructed that in determining whether the defendant unlawfully and wantonly destroyed or wasted a large number of salmon on the 26th day of July, 1913, at the place alleged in the indictment, you are to consider all the evidence before you, and in determining whether any waste or destruction of fish occurred on the date mentioned, as alleged in the indictment, should you find that there was such waste or destruction, you are to consider what notice, if any, the defendant had that there were fish at such trap and what opportunity the defendant had to obtain such fish and can them before they became wasted of destroyed."

By the COURT.—The exceptions will be allowed. The jury may now retire. [138]

Certificate of Stenographer to Proceedings.

I do hereby certify that I am the official court stenographer for the Third Judicial Division, Territory of Alaska; that as such I reported the proceedings had at the trial of the above-entitled cause, to wit, United States of America vs. Alaska Packers Association, a Corporation; that the above is a full, true and correct transcript of the evidence introduced at said trial and other proceedings had thereat.

Dated at Valdez, Alaska, November 15, 1916.

L. HAMBURGER. [139]

In the District Court for the Territory of Alaska, Third Division.

No. 437.

UNITED STATES OF AMERICA

vs.

ALASKA PACKERS ASSOCIATION, a Corporation.

Bill of Exceptions.

Comes now the above-named defendant, Alaska Packers Association, a corporation, by its attorneys Donohoe & Dimond and petitions and prays the court to settle and file and have made a part of the record of the foregoing and above-entitled cause the hereinafter mentioned exceptions; some of which may, and others which do not, appear of record herein.

And be it remembered that this cause was commenced on the 15th day of October, 1914, by filing the indictment which now appears in said record, and thereafter defendant, Alaska Packers Association, a corporation, appeared and such proceedings were had to all of which defendant Alaska Packers Association at the time thereof duly excepted, to wit:

I.

Excepts to the order of the Court made and entered on the 2d day of April, 1915, overruling defendant's motion to strike the indictment in the above-entitled cause which said motion to strike said indictment appears in the record of this cause.

II.

Excepts to the order of the Court made and en-

tered on the 2d day of April, 1915, overruling defendant's [140] demurrer to said indictment which said demurrer appears of record in this cause.

III.

And be it further remembered that this cause came on for trial on the 16th day of September, 1916, before the Court and jury, the plaintiff being represented by the Honorable Wm. A. Munley, Assistant United States Attorney and the defendant herein being represented by its attorneys Messrs. Donohoe & Dimond. The same proceeded to trial and the following is the testimony and evidence that was submitted on the part of plaintiff and submitted and offered on the part of the defendant Alaska Packers Association, a corporation. And at said trial the defendant Alaska Packers Association, a corporation, by its attorneys made the several objections and exceptions to the rulings of the Court as to the admissibility of testimony offered by the plaintiff, and at said trial the defendant, Alaska Packers Association, a corporation, by its attorneys made the several objections and exceptions to the ruling of the Court refusing to admit certain evidence offered at the trial by the defendant. All of which more fully appears from the transcript of the proceedings of the trial which said transcript is hereby embodied and made a part of this bill of exceptions.

IV.

That at said trial defendant, Alaska Packers Associations, a corporation, by its attorneys, excepted to the order of the Court at the close of plaintiff's case allowing the plaintiff to elect the date on which the

plaintiff would stand for a conviction on the indictment and excepts to the election made by the plaintiff as the 28th day of July, 1913, on which to stand for a conviction on the indictment all of which more fully appears from the transcript of the proceedings of the trial which said transcript is herewith embodied and made a part of this Bill of Exceptions. **[141]**

V.

Excepts to the ruling of the Court denying defendant's motion to strike out of the record the testimony regarding the waste and destruction of salmon at or near the place named in the indictment at any time subsequent to the 28th day of July, 1913, all of which more fully appears from the transcript of the proceedings of the trial which said transcript is herewith embodied and made a part of this Bill of Exceptions.

VI.

Excepts to the ruling of the Court denying defendant's motion at the close of the testimony on the part of the plaintiff to instruct the jury to return a verdict finding the defendant not guilty of the crime charged in the indictment on the grounds appearing fully in the transcript of the proceedings of the trial which said transcript is herewith embodied and made a part of this Bill of Exceptions.

VII.

Excepts to the ruling of the Court denying defendant's motion made at the close of entire case to instruct the jury to return a verdict finding the defendant not guilty of the crime charged in the

indictment on the same grounds set forth in Exception No. 6, all of which more fully appears in the transcript of the proceedings of the trial which said transcript is herewith embodied and made a part of this Bill of Exceptions.

VIII.

Excepts to the ruling of the Court in giving certain instructions to the jury and in refusing to give certain other instructions present to the Court by the defendant and requested by the defendant to be given to the jury as the law of this case, all of which more fully appears from the transcript of the proceedings of the trial which said transcript is hereby embodied and made a part of this Bill of Exceptions.
[142]

IX.

Excepts to the ruling of the Court made and entered on the 14th day of October, 1916, denying defendant's motion in arrest of judgment which said motion appears of record in this cause.

X.

Excepts to the order of the Court made and entered on the 14th day of October, 1916, overruling and denying the motion of defendant for a new trial; said motion and order overruling and denying the same now appears of record in this cause.

XI.

Excepts to the final judgment and sentence of the Court made, rendered and filed by the Court herein on the 14th day of October, 1916, which said judgment and sentence appears of record in this cause.

DONOHOE and DIMOND,
Attorneys for Defendant.

The above and foregoing exceptions, including the exception to the ruling of the Court in denying defendant's motion to strike the indictment; and the ruling of the Court in overruling defendant's demurrer to the indictment; and all the exceptions to the ruling of the Court at the trial of the cause, as the same appears from the transcript of the proceedings of said cause and of the testimony offered, received and rejected at the trial of this cause; and to the ruling of the Court giving certain instructions to the jury; and the refusal to give to the jury certain other instructions presented to the Court and requested to be given by the defendant as the same appears in a transcript of the proceedings had at the trial of this cause in this bill of exceptions contained, and each of them are by the Court allowed and settled and the [143] transcript of the testimony herein contained; and of the instructions given by the Court to the jury; and of the instructions presented by the defendant and requested to be given by the Court to the jury and refused by the Court, herein contained, and a transcript of the proceedings had at the trial of this cause consisting of 109 pages of typewritten matter, and the exhibit attached thereto, constitutes a full, true and correct copy of the proceedings of the said trial and of the testimony and evidence and all of the same and of the instructions given by the Court to the jury and of the instructions presented to the Court and requested by the defendant to be given to the jury and refused by the Court, thereupon which said cause

was tried and final judgment and sentence rendered therein.

IT IS HEREBY ORDERED that the same be filed and made a part of the record of this cause in the office of the clerk of the above-entitled cause.

IT IS FURTHER ORDERED that the indictment; defendant's motion to strike the indictment; minute order denying said motion to strike the indictment; defendant's demurrer to the indictment and minute order overruling defendant's demurrer to the indictment; verdict of the jury; defendant's motion in arrest of judgment and the minute order of the Court denying defendant's motion in arrest of judgment; defendant's motion for a new trial and minute order denying defendant's motion for a new trial and the judgment and sentence of this Court and the order of this Court extending the time for defendant to prepare and settle his bill of exceptions, together with the bill of exceptions herein filed, shall constitute the defendant's bill of exceptions upon the writ of error in this cause to the United States Circuit Court of Appeals for the Ninth Circuit.

DONE in open court, the said court being the District Court for the Territory of Alaska, Third Division, [144] this 7th day of December, 1916, and at the term of court in which the judgment of said cause was rendered.

By the Court.

FRED M. BROWN,
Judge.

Due and legal service is hereby accepted this 7th day of December, 1916, by receipt of copy thereof.

H. G. BENNET,

Asst. United States Attorney and Attorney for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 7, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 11, page No. 53.

[145]

In the District Court for the Territory of Alaska, Third Division.

No. 437.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,

vs.

ALASKA PACKERS ASSOCIATION, a Corporation,
Defendant and Plaintiff in Error.

Assignment of Errors.

Comes now the defendant, Alaska Packers Association, in the above-entitled action, and makes and files the following Assignment of Errors, upon which the defendant will rely in the prosecution of its Writ of Error herein.

First. The Court erred in denying the motion of defendant to set aside and quash said indictment upon the grounds set forth in said motion as the same now appears in the record of said cause.

Second. The Court erred in overruling defendant's demurrer to the indictment which said demurrer appears in the record of said cause and is made on the following grounds:

1. That the said indictment does not substantially conform to the requirements of Chapter 7, of Title XV, of the Code of Criminal Procedure, Compiled Laws of the Territory of Alaska, in that,

(a) The acts and omissions charged as the crime are not clearly and distinctly set forth in ordinary and concise language without repetition so as to enable a person of common understanding to know what is intended.

(b) That the acts and omissions charged are not set forth in such a manner as to enable a person of common understanding to know what is intended.

(c) That the acts and omissions charged as the crime are not stated with such a degree of certainty as to enable the Court to pronounce judgment upon a conviction according to the right of the case.

(d) That the defects and imperfections of said indictment are such that they actually prejudice the substantial rights of the defendant upon the merits.
[146]

2. That said indictment does not charge or allege facts against said defendant sufficient to constitute any offense or the violation of any law by the defendant.

3. That the facts stated in said indictment do not constitute a crime.

4. That more than one crime is charged in the

indictment without stating it in the manner prescribed by statute.

5. Said indictment is not direct and certain as regards the crime charged.

6. That said indictment is not direct and certain as regards the particular circumstances of the crime charged.

7. That the said indictment fails to sufficiently show that the crime charged was committed within the jurisdiction of the said court.

8. That said indictment fails to show that the crime charged was committed within the time limited by law for the commencement of an action.

9. That said indictment is defective because of ambiguity, duplicity, multifariousness, and because the same is involved and lacks that certainty of averment requisite in order to inform the defendant of the nature of the facts, or the character of the evidence which it will be required to meet upon the trial of the specific charge attempted to be made.

Third. The Court erred in permitting the plaintiff over defendant's objections to introduce evidence tending to establish that a large number of salmon or food fish were wasted or destroyed unlawfully and wantonly by the defendant in more than once thus permitting the jury to consider evidence of crimes alleged to have been committed by the defendant other than the crime charged in the indictment which said objection and ruling of the Court appears in defendant's bill of exceptions containing the record and proceedings of the trial of said cause.

Fourth. The Court erred in denying defend-

ant's motion made at the time of the introduction of the first evidence by the plaintiff tending to establish the unlawful and wanton waste and destruction of a large number of salmon or other food fish by the defendant, that the plaintiff at that time be compelled to elect a date on which it should attempt to prove the commission of the crime charged in the indictment, which said motion is fully [147] set forth in the record of the proceedings of said trial contained in defendant's Bill of Exceptions.

Fifth. The Court erred in overruling defendant's objections to evidence tending to establish the commission of the crime alleged in the indictment on any day other than the 26th day of July, 1913, that being the time elected by law as the date of the crime charged in the indictment for the reason that the plaintiff refused to elect a date and the evidence of the plaintiff's witnesses first given tended to show a wanton and unlawful waste and destruction of a large number of salmon on the 26th day of July, 1913, all of which fully appears in the transcript of the proceedings of said trial contained in defendant's Bill of Exceptions.

Sixth. The Court erred in requiring the plaintiff to elect a date as the date on which the alleged crime was committed at the close of plaintiff's testimony for the reason that the 26th day of July, 1913, had been elected by law as such date as the 26th day of July, 1913, was the date the witnesses for the plaintiff testified to be the first day on which a large number of salmon were claimed to have been unlawfully and wantonly wasted and destroyed, all of which

fully appear from the transcript of the proceedings in the trial contained in defendant's Bill of Exceptions.

Seventh. The Court erred in permitting the plaintiff, over defendant's objections made at said time, to elect as the date of the commission of such alleged crime the 28th day of July, 1913, for the reason stated in the last preceding assignment of error, all of which more fully appears in the transcript of the proceedings of said trial contained in defendant's Bill of Exceptions.

Eighth. The Court erred in permitting the plaintiff to introduce over the objections of defendant evidence tending to establish the wanton and unlawful waste and destruction by the [148] defendant of a large number of salmon or food fish on any day subsequent to the 26th day of July, 1913, for the reason that such evidence of subsequent collateral crimes or alleged crimes is not in any manner relevant proof of the crime charged in the indictment, all of which more fully appears in the transcript of the proceedings of said trial contained in defendant's Bill of Exceptions.

Ninth. The Court erred in permitting the plaintiff to introduce over the objections of the defendant evidence attempting to establish the wanton and unlawful waste or destruction of a large number of salmon or food fish by the defendant upon any date subsequent to the 28th day of July, 1916, that being the date elected by the plaintiff as the date on which the crime charged in the indictment was committed for the reason that evidence of subsequent collateral

crimes or alleged crimes it is not relevant or important testimony to prove the crime charged in the indictment.

Tenth. The Court erred in denying defendant's motion to instruct the jury to return a verdict of not guilty, which said motion was made at the close of plaintiff's testimony, the grounds of which are as follows:

1. That it appears from all the testimony offered upon the part of the Government that if any fish or salmon were destroyed or wasted at the place and time alleged in the indictment, on the date elected by the Government as the date on which they would stand for the time, to wit, the 28th day of July, 1913, they were destroyed or wasted by the two witnesses William J. Hunter and Hayward March, and not by this defendant and that this defendant was in no wise criminally liable for the waste and destruction of such fish.

2. That it appears from all the testimony introduced by the plaintiff that the fish-trap in which these fish or salmon were caught was entirely operated and controlled by the Government's *witness,* William J. Hunter and Hayward March, and that the defendant corporation had no supervision or control over the management or operation of the same. That the said two Government witnesses took fish from said trap at such times and in such manner as they saw fit and that they, the said two witnesses, were not subject, in any manner, to the orders, control or direction of the defendant company; and if it were impossible for the company for the defend-

ant corporation, to take care of the fish caught in said trap, it had no power or control over the operation of said trap, so it could prevent the fish entering said trap, or open the door in the pot of said trap so the fish could pass through and escape, and therefore the defendant corporation is in no manner criminally liable for the alleged waste or destruction of the salmon in question. [149]

3. That the Government has wholly and utterly failed to show by its testimony that the defendant company wilfully, unlawfully or wantonly did waste or destroy any salmon whatever at the time and place alleged in the indictment, or upon the 28th day of July, 1913.

4. That from the testimony introduced by the Government, the Government has utterly failed to establish that there was any salmon whatever destroyed or wasted, at or near the place described in the indictment, on the day alleged in the indictment.

5. That if the defendant corporation was in any manner criminally responsible for the waste and destruction of the salmon, as alleged in the indictment, the Government has utterly failed to show such responsibility and to prove the crime charged in the indictment against the defendant by any testimony, act or circumstance other than the testimony of William J. Hunter and Hayward March, and that the testimony of these two Government witnesses clearly shows that if the crime was committed, as alleged in the indictment, that they were accomplices in the commission of the crime, and therefore a conviction of this defendant cannot be had on the testi-

mony of such accomplices, uncorroborated as it is by any other evidence tending to connect the defendant with the commission of the crime. The motion was by the Court denied. To which ruling of the Court defendant is allowed an exception.

Eleventh. The Court erred in denying defendant's motion to instruct the jury to return a verdict of not guilty at the close of the whole case on each and all of the grounds set forth in the last preceding assignment of errors, all of which appears more fully in the transcript of the proceedings of the trial contained in defendant's Bill of Exceptions.

Twelfth. The Court erred in denying defendant's motion made at the close of plaintiff's case to strike out of the record all testimony regarding the unlawful and wanton waste or destruction of salmon at or near the place mentioned in the indictment at any date subsequent to the 28th day of July, 1913, on the ground that such testimony was incompetent, irrelevant and immaterial, the ground of this error is that under the former ruling of the Court the plaintiff selected the 28th day of July, 1913, as the date on which the defendant would stand for a conviction of the crime charged in the indictment and any evidence admitted at the trial tending to establish collateral crimes subsequent to that date is incompetent, irrelevant and immaterial and was prejudicial to the substantial rights of the defendant.

Thirteenth. The Court erred in giving to the jury its Instruction No. 2—the giving of which was duly excepted to by the defendant in the presence of the jury and before the jury retired on the ground

that the word wantonly was not properly defined in that the Court did not include in the definition the elements of perversity, mischief and turpitude, all of which more fully appears in the transcript of the proceedings of the trial contained in defendant's Bill of Exceptions. [150]

Fourteenth. The Court erred in giving to the jury its Instruction B in the form given, the giving of which was duly excepted to by the defendant in the presence of the jury before it retired, said instruction being Instruction No. 9 offered by the defendant and requested to be given to the jury. Said instruction, however, was given by the Court subject to the qualifications and provisions of the Court's Instruction No. 8 which was afterwards given to the jury.

Fifteenth. The Court erred in giving to the jury its Instruction C in the form given to which instruction the defendant duly excepted in the presence of the jury before it retired, said Instruction C being Instruction No. 10 offered by the defendant and requested to be given to the jury but as given by the Court to the jury it was given subject to the qualifications and provisions of the Court Instruction No. 8 thereafter given to the jury, and as Court Instruction No. 8 does not correctly state the law governing this case and is contrary to the law governing defendant's liability in this case, all of which will more fully appear in defendant's Assignment of Errors to Instruction No. 8 given by the Court and more fully appears in a transcript of the proceedings of said trial contained in defendant's Bill of Exceptions.

Sixteenth. The Court erred in giving to the jury its Instruction C in the form given, to which instruction the defendant duly excepted in the presence of the jury before it retired, said instruction being Instruction No. 10 offered by the defendant and requested to be given to the jury but as given to the jury it was given subject to the qualifications and provisions of the Court's Instruction No. 8, as the law of this case and is contrary to the law governing defendant's liability in this case as more fully appears in the assignment of error hereinafter set out regarding the Court giving to the jury said Instruction No. 8. [151]

Seventeenth. The Court erred in giving to the jury its Instruction No. 5 which was duly excepted to by the defendant in the presence of the jury and before it retired. Said exception is based on the ground that said instruction admitted to the consideration of the jury evidence tending to establish collateral crimes. Some of these alleged crimes were subsequent to the 26th day of July, 1913, the date on which defendant claims is elected by law as the date upon which the plaintiff should stand to prove the crime charged, and on the further ground that some of the alleged crimes were subsequent to the 28th day of July, 1913, the date formally selected by the plaintiff on which it would stand for a conviction in this case; on the further ground that the second or middle paragraph of said instruction and particularly the following quoted phrase: "This testimony was admitted only as showing a long course of conduct, etc.," was such as would naturally and neces-

sarily prejudice the substantial rights of the defendant in the minds of the jury and that the defendant would necessarily take therefrom an indication that the Court believe the defendant guilty.

Eighteenth. The Court erred in giving to the jury its Instruction No. 7 in the form given to which the defendant duly excepted in the presence of the jury and before it retired. Said exception is based on the following portion of said instruction:

> "The last two paragraphs are to be considered by you in connection *the* the following statement of the law concerning contracts for the catching or trapping of salmon, to wit":

The statement of law referred to in the above quoted portion of the Court's Instruction No. 7 is Court's Instruction No. 8, which last-named instruction is contrary to the law and is against the law and does not correctly state the law covering defendant's liability in this case.

Ninteenth. The Court erred in giving to the jury its Instruction No. 8, the giving of which was duly excepted to by the [152] defendant in the presence of the jury and before it retired the particular part of said instruction excepted to is as follows:

> "Provided such person has opportunity, means or facilities for taking care of, using or disposing of any portion of the salmon remaining after the cannery company has taken such salmon as it wants, or such cannery company has no reason to doubt such is the case; but such contract cannot lawfully be made so as to relieve

such cannery company from liability, if said cannery company, in making said contract, has knowledge that such person is using a trap which during the run of salmon will catch large numbers of salmon each tide, and such person has no means, opportunity or facilities for using or disposing of said salmon, except to the cannery company entering into said agreement, by loading said salmon on boats furnished by such cannery company, and that if such cannery company does not call for said salmon with its boats, said salmon, or a considerable quantity thereof will have to be thrown away, wasted and destroyed, and so knowing, such cannery company fails to send for the salmon and a considerable quantity thereof has to be thrown away, wasted and destroyed in consequence."

On the ground that said instruction is not the law in this case and is contrary to the law governing the defendant's liability in this case, for the reason that it is shown by the evidence that the Government's two witnesses, William Hunter and Hayward March had full and complete control and management of the trap in question; that they could have opened the door to the pot in the fish-trap and thereby permitted the fish to escape; that it was the duty of the witnesses William Hunter and Hayward March to have either closed the entrance of the trap, so that no fish could enter or to have opened the door to the pot, so that the fish could have passed through the trap and escaped to sea again, or it was the duty of said two witnesses when the defendant company's

boat failed to call for the fish to have dried or salted or otherwise disposed of the fish that were taken in their trap, for a beneficial purpose. It also appears from the testimony that the defendant company had no power, right or control over the management of said trap and could not have closed said trap so that the fish could not enter, nor could it open the door of the pot of the trap so that the salmon could pass through and escape to sea. In other words, it appears from the testimony that the defendant company had [153] no power or control over said trap so that it could in any manner limit the amount of fish caught in said trap.

It further appears from the evidence that the witnesses, William Hunter and Hayward March, the owners of said trap, were neither employees nor agents of the defendant company, but were independent contracts and that thereby the witnesses, William Hunter and Hayward March, assumed the responsibility for all fish taken in said trap.

Twenty. The Court erred in refusing to give to the jury defendant's Instruction No. 2 present to the Court by the defendant and requested to be given to the jury, to which said refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

> "You are instructed that before you will be warranted in convicting this defendant upon the indictment herein it will be necessary that the Government shall have proven to your satisfaction, beyond all reasonable doubt: (first) That a considerable number of salmon were wasted and

destroyed on the day and at the place named in the indictment; (second) That the defendant wasted and destroyed the salmon at the time and place charged; and (third) If you shall find that the salmon were wasted and destroyed by the defendant, before you can convict you must also find to your satisfaction, beyond all reasonable doubt, that such wasting and destruction by the defendant was done unlawfully and wantonly."

Twenty-one. The Court erred in refusing to give to the jury defendant's Instruction No. 3 presented to the Court by the defendant and requested to be given to the jury to which said refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

"You are further charged that the word 'wanton' when used in a statute making criminal the unlawful and wanton killing of animals and fish imports that the act is directed against the animals or fish themselves as distinguished from a wilful killing with the intent to injure the owner or violating the law. The act must be done intentionally, by design, without excuse, and under circumstances evidencing lawless and destructive spirit."

Twenty-two. The Court erred in refusing to give to the jury defendant's Instruction No. 4 presented to the Court by the defendant and requested to be given to the jury to which said **[154]** refusal defendant duly excepted in the presence of the jury

and before it retired. Said instruction is as follows:

> "You are instructed that the word 'unlawfully' implies that an act is not done in the manner as allowed or required by law; but the term 'wantonly' implies turpitude and that the act was done for a wilful and wicked purpose."

Twenty-three. The Court erred in refusing to give to the jury defendant's Instruction No. 5 presented to the Court by the defendant and requested to be given to the jury to which said refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

> "You are further charged that the word 'turpitude' as used in the last instruction means inherent baseness or vileness of principle, words or action; shameful; wicked; depraved. Moral turpitude is a matter done contrary to justice, honesty, principle or good morals."

Twenty-four. The Court erred in refusing to give to the jury defendant's Instruction No. 6 presented to the Court by the defendant and requested to be given to the jury to which said refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

> "You are charged that before you can find an act to have been done wantonly, you must be satisfied beyond all reasonable doubt that it was committed perversely, recklessly, without excuse, and without regard to the rights of others and without regard to the law. In other words

such act must have been done with mischievous intent, although the matter need not necessarily have been done with settled malice. Therefore, before you will be justified in returning a verdict of guilty in the case before you, you must find beyond all reasonable doubt that salmon were wasted and destroyed at the time and place as charged in the indictment, and also that such waste and destruction was done by the defendant recklessly, without excuse and without regard to the rights of others, perversely, with mischievous intent, and under such circumstances as to imply turpitude."

Twenty-five. The Court erred in refusing to give to the jury defendant's Instruction No. 7 presented to the Court by the defendant and requested to be given to the jury, to which said refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

"I instruct you that the defendant in this action is not brought to the bar of this Court to answer to the charge of merely destroying salmon. The laws of the United States [**155**] do not punish for the mere loss of fish. The law recognizes the fact that in the operation of a business such as a cannery, some waste of food fish will necessarily occur and that such waste and destruction are inevitable. The law, therefore, wisely refuses to punish for things which cannot be avoided. But what the law does prohibit and punish is not the waste or destruction

of food fish, but the wanton and reckless waste or destruction thereof. And you must return a verdict of not gulty herein even if you shall be satisfied beyond all reasonable doubt that some salmon were lost in the West Foreland trap, or were wasted after being taken from the trap, unless you shall also believe beyond all reasonable doubt that the defendant, or some one under its control and acting for it, wantonly and unlawfully destroyed the said fish; and the burden of proving these charges beyond all reasonable doubt rests upon the Government."

Twenty-six. The Court erred in refusing to give to the jury defendant's Instructions Nos. 9 and 10 in the form presented by the defendant and requested to be given to the jury, said instructions as given by the Court to the jury are its instructions B and C respectively, but both of said instructions were given subject to the qualifications and provisions contained in the Court's Instructions No. 8, it not being the law covering defendant's liability in this case. The defendant duly excepted to the Court's refusal to give said Instructions Nos. 9 and 10, without the qualifications mentioned, in the presence of the jury and before it retired.

Twenty-seven. The Court erred in refusing to give to the jury defendant's Instruction No. 11 presented to the Court by the defendant and requested to be given to the jury to which said refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

"I instruct you that before you are warranted in finding the defendant corporation guilty of the crime charged in the indictment, you must find beyond a reasonable doubt that the defendant, at the time it furnished a part of the gear for the construction of the trap in question, then and there agreed in all events to take and receive from Hunter and March all the fish caught in said trap during the fishing season of 1913."

Twenty-eight. The Court erred in refusing to give to the jury defendant's Instruction No. 12 presented to the Court by the defendant and requested to be given to the jury to which said **[156]** refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

"I instruct you that the evidence in this case shows that the fish trap at West Foreland where the fish alleged to have been wasted in the year 1913, was operated and controlled by witnesses William Hunter and Hayward March and that the defendant company did not have any control over the management or operation of this trap, and unless you believe from the evidence, beyond all reasonable doubt, that the defendant company positively agreed with Hunter and March that it would take all the fish caught in this trap during the season of 1913, then you must find the defendant not guilty."

Twenty-nine. The Court erred in refusing to give to the jury the defendant's Instruction No. 13 presented to the Court by the defendant and requested

to be given to the jury to which said refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

> "You are instructed that even if you shall find beyond all reasonable doubt that a large number of salmon, which had been caught at the West Foreland trap of William Hunter and Hayward March, were wasted and destroyed, you will not be warranted in returning a verdict of guilty against the defendant unless you shall further find, beyond all reasonable doubt, that the defendant was the owner of the trap and responsible for its operation; or, that it was bound by virtue of some contract with Hunter and March to take all the fish caught in the trap, within such time after the same were caught as would prevent their waste or destruction; or, that Hunter and March were the agents or employees of the defendant, as those terms shall hereinafter be *fefined* to you."

Thirty. The Court erred in refusing to give to the jury defendant's Instruction No. 14 presented to the Court by the defendant and requested to be given to the jury to which said refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

> "I instruct you that even if you believe from the evidence that the defendant corporation agreed with Hunter and March to take all the salmon caught in the trap in question during the season of 1913 and that it failed to do so, and that, owing to its failure to take the salmon

caught, witnesses Hunter and March threw the fish away and thereby they were wasted and destroyed, still if it were possible for Hunter and March at the time the company refused to take the fish in question to have dried the fish, or otherwise have [157] preserved them for a beneficial purpose, I instruct you that it was the duty of Hunter and March to have done so, and that this defendant was not criminally responsible for the act of Hunter and March in throwing away or wasting the salmon in question, and you must find the defendant not guilty."

Thirty-one. The Court erred in refusing to give to the jury defendant's Instruction No. 15 presented to the Court by the defendant and requested to be given to the jury, to which said refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

"You are instructed that even if you find from the evidence, beyond all reasonable doubt, that the defendant company made an agreement, contract or arrangement with the witness Hunter, or the witness March, or both, or either of them, to call for and take all salmon caught in said trap near West Foreland and that the defendant failed to call for and take all such salmon and that some of such salmon were thereupon wasted or destroyed, and that Hunter or March could have prevented such salmon from being wasted or destroyed by drying the same, or using them in some other lawful manner, you cannot find the defendant guilty."

Thirty-two. The Court erred in refusing to give to the jury defendant's Instruction No. 16 presented to the Court by the defendant and requested to be given to the jury, to which said refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

> "I instruct you that if you believe from the evidence that witnesses, William Hunter and Hayward March, had or exercised the control and management of the fishing-trap described in the indictment and testified to by the witnesses, that they, Hunter and March, were responsible for all fish caught in said trap until the same were sold and delivered to the defendant company, and that if any fish caught in this trap during the season of 1913 were destroyed or wasted contrary to law, before the same were sold or delivered to defendant company, then the defendant company cannot be legally convicted for such waste, regardless of any contract existing between Hunter and March and the defendant company, and you must therefore find the defendant not guilty."

Thirty-three. The Court erred in refusing to give to the jury defendant's Instruction No. 17 presented to the Court by the defendant and requested to be given to the jury, to which said refusal defendant duly excepted in the presence of the jury and [158] before it retired. Said instruction is as follows:

> "You are instructed that the witnesses Hunter and March were in charge of the West Fore-

land trap, where it is alleged a waste of salmon occurred, and that you cannot find the defendant guilty in this case unless you shall find beyond all reasonable doubt that the said Hunter and March, or either of them, in charge of said trap, were the employees or agents of the defendant corporation, and in that connection you are instructed that one is an employee or agent who is subject to the control or direction of the employer."

Thirty-four. The Court erred in refusing to give to the jury defendant's Instruction No. 18 presented to the Court by the defendant and requested to be given to the jury, to which said refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

"An employee has been defined as one who works for an employer; a person working for a salary or services; a person employed; one who is engaged in the service of another; one whose time and skill are occupied in the business of his employer.

An agent, as the term is used herein, is one who acts for another by the authority of that other; one who undertakes to transact the business or manage the affairs of another by authority or on account of such other."

Thirty-five. The Court erred in refusing to give to the jury defendant's Instructions No. 19 presented to the Court by the defendant and requested to be given to the jury to which said refusal defend-

ant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

> "If you find from the evidence that Hunter and March had the exclusive right to manage and operate said trap as they might see fit, then you cannot find the defendant in this case guilty of the crime charged, for in that event, although there may have been a contract between Hunter and March and the defendant herein whereby the defendant agreed to take certain fish of Hunter and March, the latter were independent contractors."

Thirty-six. The Court erred in refusing to give to the jury defendant's Instruction No. 20 presented to the Court by the defendant and requested to be given to the jury to which said [159] refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

> "An independent contract, as the term has been used in the foregoing instruction, is one who contracts to do a specific piece of work, furnishing his own assistance and executing the work entirely in accordance with a plan previously given him by the person for whom the work is done, without being subject to the orders of the other in respect to details of the work. The general test by which it is determined whether a person is an independent contractor or an employee is, who has the general control of the work? Who has the right to direct what shall be done and how to do it?

Thirty-seven. The Court erred in refusing to give to the jury defendant's Instruction No. 21 presented to the Court by the defendant and requested to be given to the jury to which said refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

> "You are further instructed that an indictment is merely a charging paper, and the fact that the indictment in this case charged the defendant with wasting and destroying fish, either many or few is not to be taken by you as evidence in any way and is not to be construed by you as having any bearing upon the question of the guilt or innocence of defendant; nor is the fact that it is alleged that large numbers of salmon have been destroyed to be taken by you in any other way than as a mere charge or allegation. And you are cautioned that you must not allow the contents of the indictment to in any way bias or prejudice you in your deliberations of this case."

Thirty-eight. The Court erred in refusing to give to the jury defendant's Instruction No. 23 presented to the Court by the defendant and requested to be given to the jury, to which said refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

> "You are further instructed that the defendant is not required by law to prove that it is innocent, but the Government is required to prove to your satisfaction, beyond all reasonable

doubt, that each and all of the material allegations in the indictment are true, as the term 'reasonable doubt' has been defined to you.

Thirty-nine. The Court erred in refusing to give to the jury defendant's Instruction No. 24 presented to the Court by the defendant and requested to be given to the jury to which said [160] refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

"I instruct you that under the laws of Alaska it is unlawful to can or salt for sale for food any salmon more than forty-eight hours after the same has been killed or taken from the water."

Forty. The Court erred in refusing to give to the jury defendant's instruction No. 25 presented to the Court by the defendant and requested to be given to the jury to which said refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

"I instruct you that if you find from the evidence, beyond all reasonable doubt, that the defendant corporation did unlawfully and wantonly waste or destroy salmon in large quantities, at the time and place alleged in the indictment, before you can find it guilty of the crime charged you must further find from all the testimony before you that there is testimony introduced at the trial of this cause, other than that of William Hunter and Hayward March, the two Government witnesses in this case, tending in some manner to corroborate the testimony

of these two witnesses; and I instruct you that under the testimony offered in this trial, should you find the defendant corporation guilty of unlawfully and wantonly wasting salmon at the time and place alleged in the indictment, then said two witnesses, William Hunter and Hayward March, are two accomplices of the defendant in said crime and you cannot find the defendant guilty on the testimony of such accomplices, uncorroborated by any other evidence tending to connect the defendant with the commission of the crime."

Forty-one. The Court erred in refusing to give to the jury defendant's instruction No. 26 presented to the Court by the defendant and requested to be given to the jury to which said refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

"In its operation of its salmon cannery at Kasiloff, the defendant in this action was governed by the provisions of the law known as the Act of June 30, 1906, commonly called the Food and Drugs Act, which provides, in part, as follows:

'That it shall be unlawful for any person to manufacture within any Territory or the District of Columbia any article of food * * * which is adulterated * * * within the meaning of this Act. * * * That for the purpose of this Act an article shall be deemed to be adulterated * * *

Sixth: If it consists in whole or in part of a filthy, decomposed, or putrid *anumak* or vegetable **[161]** substance, or any portion of an animal unfit for food, whether manufactured or not.'

Therefore, I instruct you that if the salmon in question alleged to have been wasted and destroyed had in any manner become decomposed before the defendant corporation could get them to its cannery at Kasiloff and can the same, then and in that event said defendant could not have canned said salmon without violating the law above quoted, regardless as to whether the salmon were killed forty eight hours previously or not."

Forty-two. The Court erred in refusing to give to the jury defendant's instruction No. 27 presented to the Court by the defendant and requested to be given to the jury to which said refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

"You are instructed that under the testimony offered by the Government in this case, it has elected to stand upon the 28th day of July, 1913, as the day on which it claims the alleged violation of law, as appears in the indictment, was committed by the defendant corporation. You will, therefore, not consider, in arriving at your verdict, any of the testimony offered, tending to establish a waste or destruction of salmon on any date after the 26th day of July, 1913. And

unless you are satisfied beyond a reasonable doubt, that the defendant corporation unlawfully and wantonly wasted or destroyed a large number of salmon on that date, you must find the defendant not guilty."

Forty-three. The Court erred in refusing to give to the jury defendant's instruction No. 28 presented to the Court by the defendant and requested to be given to the jury to which said refusal defendant duly excepted in the presence of the jury and before it retired. Said instruction is as follows:

"You are instructed that in determining whether the defendant unlawfully and wantonly destroyed or wasted a large number of salmon on the 26th day of July, 1913, at the place alleged in the indictment, you are to consider all the evidence before you, and in determining whether any waste or destruction of fish occurred on the date mentioned, as alleged in the indictment, should you find that there was such waste or destruction, you are to consider what notice, if any, the defendant had that there were fish at such trap and what opportunity the defendant had to obtain such fish and can them before they became wasted or destroyed."

Forty-four. The court erred in denying defendant's motion in arrest of judgment. **[162]**

Forty-five. The Court erred in making and entering its order overruling and denying defendant's motion for a new trial which said motion is fully set out in the records of this cause.

Forty-six. The Court erred in making and entering its final judgment and sentence in this case against the defendant, which said judgment and sentence is contained in the records of this cause, on the ground that the evidence was insufficient to justify the verdict rendered by the jury and that said verdict was against the law.

WHEREFORE, defendant and plaintiff in error prays that the judgment of said District Court for the Territory of Alaska, Third Division, be reversed, set aside and held for naught.

DONOHOE and DIMOND,
Attorneys for Defendant and Plaintiff in Error.

Due service of the foregoing Assignment of Errors is hereby accepted by receipt of a copy thereof this 7th day of December, 1916.

H. G. BENNETT,
Asst. United States Attorney.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Dec. 7, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. **[163]**

In the District Court for the Territory of Alaska, Third Division.

No. 437.

UNITED STATES OF AMERICA

vs.

ALASKA PACKERS ASSOCIATION, a Corporation,

Petition for Writ of Error.

Comes now Alaska Packers Association, a corporation, the above-named defendant in the above-entitled cause and says; that on the 14th day of October, 1916, the above-entitled court made and entered a judgment and sentence herein against the defendant, adjudging that the defendant pay to the United States of America a fine in the sum of $200;

That in the said judgment and sentence and in the proceedings had prior thereto, certain errors were committed to the prejudice of defendant all of which more fully appears in the Assignment of Errors which is filed with this petition.

WHEREFORE, defendant prays that a Writ of Error do issue in his behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the errors so complained of, and that the transcript of the record, testimony, proceedings and papers in this cause, duly authenticated, may be sent to the said United States Circuit Court of Appeals, for the Ninth Circuit and that such other and further proceedings may be had in the premises as may be proper therein.

DONOHOE and DIMOND,

Attorneys for Defendant and Plaintiff in Error.

Due service of the above petition for a Writ of Error admitted this 7th day of December, 1916, by receipt of a copy thereof.

H. G. BENNET,

Asst. United States Attorney.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Dec. 7, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. **[164]**

In the District Court for the Territory of Alaska, Third Division.

No. 437.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,
vs.
ALASKA PACKERS ASSOCIATION, a Corporation,
Defendant and Plaintiff in Error.

Order Allowing Writ of Error.

On this 7th day of December, 1916, came the defendant and plaintiff in error herein, by its attorneys, and filed and presented to the Court its petition praying for the allowance of a Writ of Error, and the Assignment of Errors intended to be urged by him; praying also that a transcript of the record, testimony, proceedings and papers upon which the order and judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

NOW THEREFORE, in consideration of the premises and the Court being fully advised;

IT IS ORDERED, that the aforesaid writ of error be, and the same is hereby allowed.

IT IS FURTHER ORDERED that a transcript of the record, testimony, papers, files and proceedings in this cause, duly authenticated be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

FRED M. BROWN,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Dec. 7, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 11, page No. 54. **[165]**

In the District Court for the Territory of Alaska, Third Division.

No. 437.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,

vs.

ALASKA PACKERS ASSOCIATION, a Corporation,
Defendant and Plaintiff in Error.

Writ of Error.

The President of the United States, to the Honorable FRED M. BROWN, Judge of the District Court for the Territory of Alaska, Third Division, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in said District Court before you, or some of you, between the United States of America, plaintiff, and

the Alaska Packers Association, a corporation, defendant, manifest error hath happened to the great damage of said defendant Alaska Packers Association, a corporation, as is stated in its petition herein. We being willing that error, if any hath been, shall be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in said Circuit within sixty days from the date of this writ, in the said Circuit Court of Appeals, to be then and there held; that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and **[166]** and according to the laws and customs of the United States should be done.

WITNESS, The Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 7 day of December, 1916.

Allowed by:

FRED M. BROWN,

Judge of the District Court for the Territory of Alaska, Third Division.

[Seal] Attest: ARTHUR LANG,

Clerk of the District Court for the Territory of Alaska, Third Division.

Entered Court Journal No. 11, page No. 54.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Dec. 7, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. **[167]**

In the District Court for the Territory of Alaska, Third Division.

No. 437.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,
vs.
ALASKA PACKERS ASSOCIATION, a Corporation,
Defendant and Plaintiff in Error.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we Alaska Packers Association, a corporation, as principal and the First Bank of Valdez, of Valdez, Alaska, a corporation, as sureties, are held and firmly bound unto the United States of America, respondent upon this writ of error, in the sum of five hundred dollars ($500), United States gold coin to be paid to the aforesaid United States of America for which payment, well and truly to be made, we bind ourselves and our assigns jointly and severally firmly by these presents.

Dated this 7th day of December, 1916.

WHEREAS, Alaska Packers Association, a corporation, the hereinabove named defendant and principal lately at a session of the District Court for the Territory of Alaska, Third Division, in said court wherein the United States of America was plaintiff

and the Alaska Packers Association, a corporation, was defendant a judgment and sentence was rendered against said defendant, and said defendant having obtained from said court an order allowing a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment and sentence entered in **[168]** the aforesaid action, and a citation directed to the United States of America, the Attorney General of the United States of America, and Wm. N. Spence, United States Attorney for the Third Division of the Territory of Alaska, is about to issue citing and admonishing each of said parties to be and appear in the United States Circuit Court for Appeals for the Ninth Circuit to be holden at San Francisco, California:

NOW the condition of the above obligation is such that if the said Alaska Packers Association, above named, shall prosecute its said writ of error to effect and shall answer for all damages, fines and costs that may be assessed against it; if it fails to make its plea good then this obligation is to be void, otherwise to remain in full force and virtue.

IN WITNESS WHEREOF, said principal and surety have hereunto set their hands this 7th day of December, 1916.

ALASKA PACKERS ASSOCIATION.
By T. J. DONOHOE,
Attorney of Record.

THE FIRST BANK OF VALDEZ.
By M. BLUM,
Vice-President.

[Seal] Attest: J. W. GILSON,
Asst. Secretary.

The sufficiency of the foregoing surety on the foregoing bond, and the foregoing bond approved this 7th day of December, 1916, and execution on the judgment and sentence in this case is hereby stayed.

FRED M. BROWN,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Dec. 7, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. **[169]**

In the District Court for the Territory of Alaska, Third Division.

No. 437.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,

vs.

ALASKA PACKERS ASSOCIATION, a Corporation,
Defendant and Plaintiff in Error.

Citation on Writ of Error.

United States of America,
Territory of Alaska,
Third Division,—ss.

The United States of America to the Attorney General of the United States and to Hon. WM. N. SPENCE, United States District Attorney for the Third Judicial Division of the Territory of Alaska, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals

for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writing, pursuant to a writ of error in the clerk's office of the District Court for the Territory of Alaska, wherein Alaska Packers Association, a corporation, is plaintiff in error and the United States of America is defendant in error, and show cause if any there be why the judgment in said writ of error should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS The Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States this 7th day of December in the year of our Lord the one thousand nine hundred and sixteenth and of **[170]** our Independence the one hundred and fortieth.

FRED M. BROWN,
Judge of the District Court for the Territory of Alaska, Third Division.

United States of America,
Territory of Alaska,
Third Division,—ss.

I, the undersigned, clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the hereto attached is a full, true and correct copy of the original Citation on Writ of Error in Cause No. 437, United States of America, Plaintiff and Defendant in Error, vs. Alaska Packers Association, a Corporation, Defendant and Plaintiff in Error.

IN TESTIMONY WHEREOF, I have subscribed my name and affixed the seal of the said Court at Valdez, Alaska, this 7th day of December, 1916.

[Seal] ARTHUR LANG,
Clerk.

By ————————————,
Deputy.

A copy of the foregoing writ of error and citation on writ of error is hereby accepted this 7 day of December, 1916, by receipt of a certified copy thereof at Valdez, Alaska,

H. G. BENNET,
Asst. United States District Attorney for the Third Division of the Territory of Alaska. **[171]**

In the District Court for the Territory of Alaska, Third Division.

No. 437.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,

vs.

ALASKA PACKERS ASSOCIATION,
Defendant and Plaintiff in Error.

Order Extending Time in Which to File Record in the Circuit Court of Appeals, Ninth Circuit.

It appearing to the satisfaction of the Court that thirty days is insufficient time in which to prepare, authenticate, and transmit to the clerk of the United States Circuit Court of Appeals, Ninth Circuit, at San Francisco, California, the records in the above-

entitled cause on Writ of Error from the final judgment rendered on the 14th day of October, 1916, by the District Court for the Territory of Alaska, Third Division.

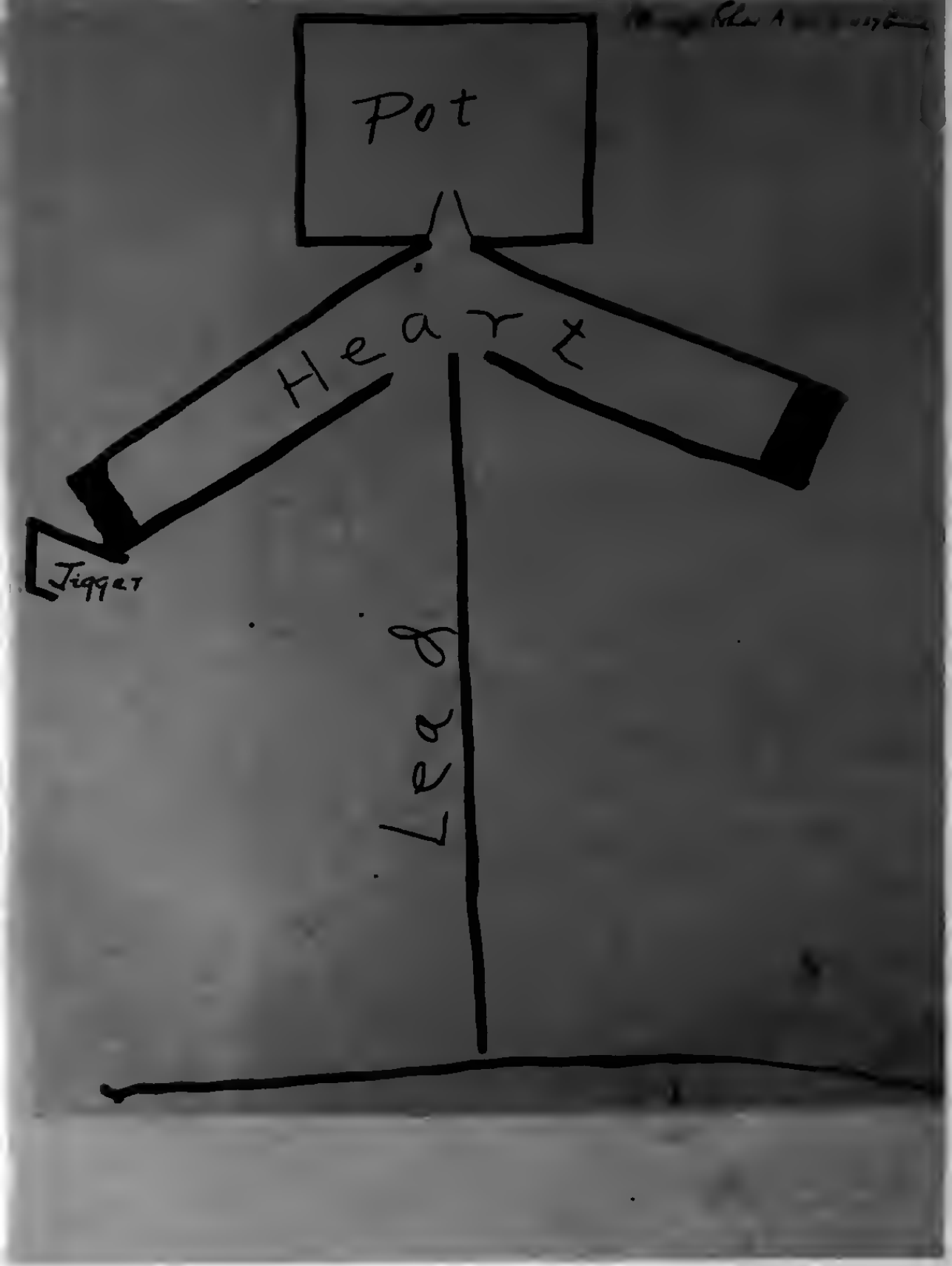
IT IS HEREBY ORDERED that the said Alaska Packers Association, Plaintiff in Error, be given, and is given such additional time as may be required but not in any event to extend later than the 5th day of February, 1917, in which to prepare and transmit the said records in its writ of error heretofore issued in this cause to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, in the State of California.

Dated this 7th day of December, 1916.

FRED M. BROWN,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Dec. 7, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 11, page No. 55. **[172]**


Pot
Heart
Jigger
Leg

In the District Court for the Territory of Alaska, Third Division.

No. 437.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,
vs.
ALASKA PACKERS ASSOCIATION, a Corporation,
Defendant and Plaintiff in Error.

Order Re Transmission of Plaintiff's Exhibit "A."

Good cause being shown, IT IS HEREBY ORDERED that the clerk of this court in transmitting the record of this case to the United States Circuit Court of Appeals for the Ninth Circuit transmit the original Plaintiff's Exhibit "A" instead of making a tracing thereof.

Dated at Valdez, Alaska, this 7th day of December, 1916.

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Dec. 7, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 11, page No. 56. **[174]**

In the District Court for the Territory of Alaska, Third Division.

CRIMINAL No. 437.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,

vs.

ALASKA PACKERS ASSOCIATION, a Corporation,
Defendant and Plaintiff in Error.

Certificate of Clerk District Court to Transcript of Record, etc.

United States of America,
Territory of Alaska,
Third Division,—ss.

I, Arthur Lang, clerk of the District Court, Territory of Alaska, Third Division, do hereby certify that the foregoing and hereto attached, typewritten pages, numbered from 1 to 175, inclusive, are a full, true and correct transcript of the records and files of the proceedings in the above-entitled cause as the same appears on the records and files in my office; that this transcript is made in accordance with the praecipe filed in my office, December 7th, 1916, and made a part of said transcript, and I hereby certify that the foregoing transcript has been prepared, examined and certified to by me, and that the cost thereof, amounting to twenty-nine and 25/100 Dollars ($29 25/100), have been paid to me by the plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court this 3d day of January, 1917.

[Seal] ARTHUR LANG,
Clerk. **[175]**

[Endorsed]: No. 2927. United States Circuit Court of Appeals for the Ninth Circuit. Alaska Packers Association, a Corporation, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Territory of Alaska, Third Division.

Filed January 20, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 2927

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALASKA PACKERS ASSOCIATION
(a corporation),
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

GEORGE H. WHIPPLE,
EVAN WILLIAMS,
DONALD Y. LAMONT,
Attorneys for Plaintiff in Error.

Filed this.....day of May, 1917.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING COMPANY

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No. 2927

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALASKA PACKERS ASSOCIATION
(a corporation),
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of Facts.

Plaintiff in error was convicted of the violation of Section 266 of the Compiled Laws of the Territory of Alaska, providing as follows:

> "That it shall be unlawful for any person, company or corporation wantonly to waste or destroy salmon or other food fishes taken or caught in any of the waters of Alaska."

The indictment conformed to the wording of the statute, charged but one offense, and fixed the date of that offense as the 30th day of July, 1913.

Upon the trial, the Government offered evidence of fourteen distinct violations by plaintiff in error of

Section 266. This evidence tended to establish one violation per day for fourteen successive days, to wit, from July 26, 1913, to August 8, 1913, inclusive. The fourteen different offenses were presented by the Government in chronological order and when the evidence of the first offense, to wit, that of July 26, 1913, was offered, counsel for plaintiff in error objected to its introduction, unless the Government elected to stand on an offense committed on that day. The objection was overruled and the evidence of that offense and of a similar offense occurring upon July 27, 1913, was admitted. The Government then proceeded to offer evidence of a third violation occurring on July 28, 1913. Plaintiff in error renewed its objection and moved that the Government be forced to state upon which offense it relied. The motion was denied and evidence of the twelve other offenses was thereupon, and over the objections of plaintiff in error, introduced.

It was not until the conclusion of the Government's case that the court directed it to elect upon which violation it would ask a conviction; whereupon its counsel, over the objection of the plaintiff in error, elected the violation occurring upon July 28th. The court later instructed the jury to pass upon the guilt or innocence of plaintiff in error as to that violation, and apparently for that offense and no other plaintiff in error was convicted.

The record presents but one serious question for consideration, namely, whether the plaintiff in error

was convicted for the offense for which it was indicted and tried or for another and different offense. This question is in turn raised by the denial of the motion of the plaintiff in error that the Government be forced to elect, by the ruling made at the close of the Government's case allowing it to stand upon the offense of July 28th, and by the admission of evidence over the objections of plaintiff in error as to any offense other than the one covered by the indictment except for the purpose of showing *wantonness* on the part of plaintiff in error.

Specifications of Error.

Plaintiff in error has assigned as error the following (Record pp. 154-156):

> "Fourth. The court erred in denying defendant's motion made at the time of the introduction of the first evidence by the plaintiff tending to establish the unlawful and wanton waste and destruction of a large number of salmon or other food fish by the defendant, that the plaintiff at that time be compelled to elect a date on which it should attempt to prove the commission of the crime charged in the indictment, which said motion is fully set forth in the record of the proceedings of said trial contained in defendant's bill of exceptions.
>
> Fifth. The court erred in overruling defendant's objections to evidence tending to establish the commission of the crime alleged in the indictment on any day other than the 26th day of July, 1913, that being the time elected by law as the date of the crime charged in the indictment for the reason that the plaintiff re-

fused to elect a date and the evidence of the plaintiff's witnesses first given tended to show a wanton and unlawful waste and destruction of a large number of salmon on the 26th day of July, 1913, all of which fully appears in the transcript of the proceedings of said trial contained in defendant's bill of exceptions.

Sixth. The court erred in requiring the plaintiff to elect a date as the date on which the alleged crime was committed at the close of plaintiff's testimony for the reason that the 26th day of July, 1913, had been elected by law as such date as the 26th day of July, 1913, was the date the witnesses for the plaintiff testified to be the first day on which a large number of salmon were claimed to have been unlawfully and wantonly wasted and destroyed, all of which fully appears from the transcript of the proceedings in the trial contained in defendant's bill of exceptions.

Seventh. The court erred in permitting the plaintiff, over defendant's objections made at said time, to elect as the date of the commission of such alleged crime the 28th day of July, 1913, for the reason stated in the last preceding assignment of error, all of which more fully appears in the transcript of the proceedings of said trial contained in defendant's bill of exceptions."

Argument.

PLAINTIFF IN ERROR WAS TRIED FOR AN ALLEGED VIOLATION OF SECTION 266 OF THE COMPILED LAWS OF ALASKA, OCCURRING UPON JULY 26, 1913, AND CONVICTED FOR A SEPARATE AND DISTINCT OFFENSE OCCURRING ON JULY 28, 1913.

To fully realize the truth of the above contention, it will be necessary to examine more in detail the

proceedings in the lower court. The indictment set forth the violation as occurring on July 30th. We concede that this did not bind the Government to any precise date, if it chose to claim upon the trial that the offense charged in the indictment as a matter of fact occurred upon some other date, but the indictment did cover but one offense, and a conviction for only one offense could be secured thereunder. In this respect the Government was absolutely bound, and the question resolves itself into which one of the fourteen alleged violations was covered by the indictment.

The Government made no express election at the beginning of the trial as to any one of the fourteen offenses. It first of all proved the contract between the complaining witnesses and the plaintiff in error, to the effect that plaintiff in error would take all the fish that the complaining witnesses caught; it proved notice sent to the plaintiff in error on July 25, 1913, that the complaining witnesses had on hand red salmon, which plaintiff in error was under a duty to take, and that the complaining witnesses would continue to have on hand red salmon for several weeks to come. The Government then proceeded in chronological order to prove the waste of fish on the fourteen successive days, commencing with July 26th.

The order of proof of the first three offenses is most vital, and we will, therefore, be obliged to make detailed reference to the transcript. At the very opening of the Government's case, and by the

testimony of Hayward March, the first witness called, it established the contract between the plaintiff in error and the complaining witnesses, to the effect that plaintiff in error would take all the fish which the complaining witnesses caught. We quote from pages 28 and 29 as follows:

> "Q. What was that conversation, what was it about?
>
> A. Me and Mr. Hunter went to Kasiloff on or about the 28th of April, if I remember right, about that time. We landed there in a small boat, called a sloop, landed on the beach—don't know what time of day it was. We went up on the wharf, me and Hunter, and I met Captain Williams and he met me; I knowed him and he knowed me. He said, 'Well, March, what can I do for you?' I said, 'I came down to see about fishing—I understand you are going to buy fish and let out gear, and so on.' He says, 'What gear do you want—trap gear?' and I said 'Trap gear', and he said, 'Make out your list of what gear you want and give it to the beach boss on the wharf, as he is the man that handles that gear.' And I spoke about the fish and he said, 'I will take all your fish and furnish scows, as we have steamers and scows and the Alaska Packers Association can afford to pay you for what little fish you catch,' as Captain Williams knew I wasn't going to catch a hundred thousand fish."

The Government then proceeded to enter more minutely into the relationship between the complaining witnesses and the plaintiff in error and to establish that the contract in question was carried out by the plaintiff in error during the entire run of king salmon in Alaskan waters, to wit, from

May 25th to June 25th, 1913, approximately. It thereupon introduced evidence to the effect that the run of red salmon started upon the 24th day of July, and that Hunter, upon the 25th day of July went to communicate this fact to plaintiff in error. We quote from page 43 of the transcript as follows:

"Q. About what time did the red fish run begin?

A. The run, what we call the run of red fish, started on the 24th.

Q. The big run of red fish?

A. The big run of red fish.

Q. The 24th of what? A. July.

Q. 1913? A. Yes, sir.

Q. What did you do?

A. The morning of the 24th of July I got up as usual. We can take a glass and look at the trap on high tide and if there is a quantity of fish in your trap you can see them, and as I done that, I said to Mr. Hunter, 'I guess the run of salmon is in.' I took the boat and went out to the trap and Hunter started to fix the sloop up—it was lying there from the month of May up to that time—to get word to Captain Williams. I didn't pay much attention to Hunter and he didn't to me. I went to work the trap and took out 2500 fish that day and put them in the scow—2500 red fish.

Q. Took them out of the trap? A. Yes, sir.

Q. On that day that you spoke to Hunter?

A. Yes, sir, the 24th.

Q. And you put them on your scow? A. Yes.

Q. Did you take out any the next day?

A. The morning of the 25th Mr. Hunter went to Kasiloff."

* * * * * * *

"Q. Did you take out any the next day?

A. Yes, sir.

Q. How many did you take out that day?

A. 2500.
Q. Did you say that Hunter went away from the trap? A. Yes, sir.
Q. Where did he go? A. Kasiloff.
Q. When did he leave? A. The 25th.
Q. Of July? A. Yes, sir."

Thus far, absolutely no violation of Section 266 had been shown, in that no waste of any fish by plaintiff in error had been in any way established by the evidence. At this point, however, the Government proceeded to show the first waste of fish, and its proof was neither as to the 30th day of July, the date named in the indictment, nor was it as to the 28th day of July, for which offense plaintiff in error was found guilty. The first showing, on the contrary, was that plaintiff in error upon the 26th day of July was guilty of such violation. It then showed a similar violation on the 27th, and it was not until these two distinct violations had been established that any violation occurring on the 28th day of July was put in evidence. We now quote the pertinent parts of the transcript, found upon pages 44, 45 and 46, showing that evidence as to the offenses occurring upon the 26th and 27th of July was first introduced as follows:

"Q. These 2500 salmon you took out, red fish you took out on the 24th? A. Yes, sir.
Q. And 2500 on the 25th? A. Yes, sir.
Q. Did any boat call from the cannery on those days? A. No, sir.
Q. How many did you take out on the 26th?
A. About a thousand."

* * * * * *

"Q. On the 26th you say you took out a thousand? A. Yes, sir.

Q. On the 27th did you take out any?
A. Yes, sir.
Q. How many? A. About a thousand fish.
Q. You say the boat did not call on the 24th?
A. No, sir.
Q. Nor on the 25th? A. No.
Q. Did it call on the 26th? A. No.
Q. I mean the cannery boat? A. No, sir.
Q. That boat was called what?
A. The 'Reporter'.
Q. The 'Reporter' didn't call on either of these three days? A. No, sir.
Q. Did it call on the 27th? A. No, sir.
Q. How many did you take out on the 27th?
A. About a thousand fish.
Q. Now, you had 2500 on the 24th, 2500 on the 25th, a thousand on the 26th and a thousand on the 27th? A. Yes, sir.
Q. What became of these fish?
A. On the 26th——"

* * * * * *

"A. On the 26th I have taken out about a thousand fish. I kicked them into the two boats I had. There was too much for one boat and I divided them up into two boats and I took those fish out and put them all in one boat—it was smooth water and I kept the fish there all day until evening thinking the steamer would come.

Mr. DONOHOE. Is that the evening of the 26th you are speaking of?

A. Yes, sir. And the steamer didn't come, and I held the 5000 fish I had in the scow; I dumped them overboard and threw the fresh fish in. On the 27th I took out about a thousand fish and threw them into the scow."*

---

* That the foregoing testimony established an offense committed upon the 27th day of July, is readily apparent by bearing in mind Section 265 of the Compiled Laws of the Territory of Alaska, as follows:

"It shall be unlawful to can or salt for sale for food any salmon more than forty-eight hours after it has been killed."

It was not until after the following question had been put by the Government that any evidence as to the 28th was offered (see page 46):

> "Q. When did the boat come, the 'Reporter', the cannery boat?"

The answer to that question was, "The 28th".

It was then for the first time that the Government established the offense occurring upon July 28th, and for which plaintiff in error was convicted, as follows (Transcript, pages 46, 47, 49):

> "Q. The cannery boat came on the 28th?
> A. Yes, sir.
> The COURT. How far is it from the cannery to this trap, about?
> A. About 28 miles.
> Q. It came on the 28th—at what time, in the morning or evening?
> A. I believe on the flood tide—it was somewhere around high water I know, when the boat came.
> Q. What time? A. I couldn't exactly tell.
> Q. How many fish did you have for them then?
> A. I had then two thousand fish in the scow."
>
> * * * * * * *
>
> "Q. What was done on the 28th?
> A. On the 28th the steamer 'Reporter' called, Captain Christiansen. He asked me what fish we had in the scow and I told him I had 2000 fish in the scow. 'Well', he says, 'I have got orders from the superintendent to come over and give you a receipt for what fish you have got, but I ain't going to take them.'
> Q. He wouldn't take any?
> A. He didn't take any.

Q. What became of the fish?
A. I threw them overboard.
Q. He wouldn't take the fish? A. No.
Q. Did he go away without any fish?
A. I scooped a few fish out alive as he laid there—I ripped the webbing from my trap and took them out with a scoop net, but I didn't count them. He gave me a receipt for the 2,000.
Q. He gave you a receipt for the 2000 and told you to throw them overboard? A. Yes, sir.
Mr. DONOHOE. We object to that—he didn't say that—to throw them overboard.
Q. Well, he wouldn't take them? A. No, sir."

THE GOVERNMENT SHOULD HAVE BEEN FORCED BY THE COURT, TO ELECT AT THE OPENING OF THE CASE UPON WHAT OFFENSE IT RELIED, AND IN THE ABSENCE OF SUCH EXPRESS ELECTION, IT MUST BE DEEMED TO HAVE ELECTED THE FIRST OFFENSE ESTABLISHED BY THE EVIDENCE, TO WIT, THAT OF JULY 26TH. IT WAS THEREFORE ONLY FOR THAT OFFENSE THAT PLAINTIFF IN ERROR WAS ON TRIAL AND COULD HAVE BEEN CONVICTED.

It is well established law that in criminal cases evidence of other and similar offenses occurring about the same time is only admissible in corroboration of such elements as motive and intent. No doubt in this case the learned judge in the trial court allowed the introduction of the numerous offenses, upon the theory that it was corroborative evidence as to the *wanton* perpetration by the plaintiff in error of the offense charged in the indictment. But even though such evidence is admissible under circumstances, like the present,

there are certain well established principles of criminal law which must be borne in mind. The first and foremost is that a person charged with a criminal offense is only expected to prepare a defense as to the crime with which he is charged and not as to thirteen others. He is entitled to know at the very outset of his trial upon what offense the Government relies. The second principle to be borne in mind is that other and similar offenses are only admissible as corroborative evidence and not in any sense as direct evidence to the effect that a defendant in a criminal matter committed the crime with which he is charged. Under these circumstances, until there is evidence in the record of the crime with which the defendant is charged, there is no evidence to be corroborated, and the proof of other offenses has no place.

Bearing the two foregoing principles in mind, the courts have almost universally held that the prosecution must elect at the beginning of the trial, and where the prosecution proceeds without electing, the law will elect for it, and designate the first violation established to be the one covered by the indictment. Since these considerations are vital to the rights of plaintiff in error, we will set forth the authorities at length:

In *People v. Flaherty,* 162 New York 532, the exact point was presented for the consideration of the ~~Circuit~~ Court of Appeals of New York. The facts were, briefly, as follows: The defendant had been indicted for the crime of an act of sexual

intercourse with a female, not his wife, under the age of 16 years, the indictment charging but one offense. The complaining witness testified that the defendant had had sexual intercourse with her on seven different occasions prior to her becoming of the age of 16 years, and at the very outset of the trial counsel for the defendant moved that the prosecuting attorney be forced to elect upon which of the seven offenses he would demand a verdict of guilty. The motion was denied and it was not until the close of its case that the prosecution made any selection.

The [redacted] Court of Appeals held that the failure of the trial court to force the prosecution to elect at the very outset was error and the judgment of conviction was reversed.

Due to the fact that in that case not only the exact legal principle was involved, but also for the purposes of this argument a situation identical with the present, we take the liberty of quoting from that decision at greater length than would ordinarily be permissible as follows:

> "* * * (p. 538) As these errors call for a reversal of the judgment, we might not consider the case further were it not that the trial was conducted in distinct violation of the right of the defendant in most important respects, and as the same course was pursued on the former trial to a certain extent, it seems to be our duty to guard against the repetition on the next trial of some errors most damaging in effect, which the defendant has had to meet on the previous trials. The indictment charges the defendant

with the crime of an act of sexual intercourse with a female not his wife under the age of sixteen years, and alleges in due form that the act constituting the crime was committed on the 1st day of July, 1892. The complainant says that the defendant had sexual intercourse with her on seven different occasions prior to her becoming of the age of sixteen years. Notwithstanding the fact that if all of said acts were committed they constituted seven distinct crimes, for only one of which defendant was or could have been charged in this indictment, the People were permitted on the former trial to prove all of these acts and the jury authorized to find the defendant guilty, provided they found he had committed any one of them. On the trial, which is the subject of this review, the court refused to follow the precedent thus set for it in one respect only; it did hold finally that the defendant could be convicted for only one offense, but that decision did not go far enough, as we shall see, nor was it made at the time that it should have been. The defendant was represented by skilled counsel, who, although having but a very short time for the preparation of the case, fully appreciated the difficulties that had unjustly been placed upon the defendant on the former trial to defend against seven distinct crimes where but one was or could have been charged, and so, at the very opening of the trial, by request to the court, and also to the district attorney in open court, by direct motion made and objection to evidence taken, the counsel presented in almost every way conceivable to the court that the defendant was charged with but one crime, could be tried for but one, and was entitled to know at the very beginning of the trial whether he was to be tried for a crime committed on the date alleged in the indictment, and if not, then that the People should state the date of the crime which it was pur-

posed to prove as the one charged in the indictment. But the district attorney protested that it was his right to prove as many similar crimes as he could and to submit any one he chose as the one charged in the indictment. The court sustained the position of the district attorney and for seven days the taking of testimony on the part of the People proceeded, during the course of which twenty-one witnesses were called and testified to various outlying circumstances offered apparently in the hope that they might be in the end regarded as in some way corroborating the complainant as to some one of the transactions detailed by her. A long, skillful and, at times, effective cross-examination had taken place, but without any knowledge on the part of the cross-examiner as to which one of the seven acts about which the complainant testified was to be submitted to the jury as the crime charged in the indictment. The People rested and then the court offered to entertain a motion to compel the People to elect upon which one of the transactions it would stand. The motion was made; direction to the People given; selection made; and then just at the very moment when the defendant was obliged to put his witnesses on the stand in support of his defense he was advised, and for the first time, for what particular crime his conviction was to be asked at the hands of the jury." * * *

"* * * (p. 540) And yet, as we have seen, the People were permitted to prove these seven distinct acts as seven distinct crimes charged in the indictment, for either one of which the defendant could be convicted under the indictment, the choice of selecting the one upon which the jury should be asked to find a verdict of guilty being left to the close of the People's case and could well have been left, according to the view of the district attorney,

until it became time to present the case to the jury. In other words, the effect of erroneously alleging a crime as having been committed on a particular date has, if this view be correct, great advantages for the prosecution over that of alleging things truly as the law contemplates; for in the latter case even the district attorney would not contend that he could offer evidence tending to prove six other crimes and ask for the conviction for such one of them as he should elect. But the error of date in the indictment, whether the result of mistake or intention, carries with it no such power to the prosecuting officer. * * * It is not difficult to understand how the court came to fall into error in respect to the matter we have been considering; for to the general rule that a defendant in a criminal action cannot have proved against him the commission of other crimes unless he puts his character in issue, there is an apparent exception where the charge is of unlawful sexual intercourse. Such evidence, however, is not admitted for the purpose of proving other offenses against the law, but solely upon the view that it may tend to corroborate the complainant's account of the acts alleged in the indictment as constituting the crime." * * *

"* * * (p. 542) We do not mean to say that a trial court should not, under any circumstances admit corroborative evidence in advance of evidence tending to prove the offense charged, but there was no excuse for taking that course in this case. The grievance of the defendant herein is founded upon much broader lines than the mere order of procedure, and is that the court sustained the efforts of the district attorney to prevent him during seven days of the trial from finding out as to which one of the seven offenses testified to by the complainant he was indicted for and

> was to be tried for. This was done on the erroneous view of the law that the indictment covered not simply one offense, but each and every one of seven distinct offenses down to such time as the district attorney should be pleased to elect, or the court should compel him to choose, one offense for presentation to the jury, at which moment the other six offenses would cease to be covered by the indictment. This is a view for which we have been unable to find any support either in principle or authority."

The language above quoted will bear a most thorough analysis, and such analysis will show conclusively that exactly the same steps were taken by the defendant in that case as were taken by the plaintiff in error and that the position of the defendant in that case was identical to the position of the plaintiff in error. The court of New York in the foregoing language first lays emphasis upon the fact that the indictment charged but one offense and under it only one conviction could be had. It then lays emphasis upon the fact that at the opening of the trial counsel for the defendant moved that the prosecution be forced to elect, and took objections to the evidence upon the ground that no election had been made. We refer the court to pages 44 to 48, inclusive, of the transcript for a similar motion and similar objections.

The New York court dwells upon the circumstance that counsel for the defendant was forced to conduct a cross-examination involving seven distinct crimes, not knowing at any time during that cross-

examination which of the seven distinct crimes was covered by the indictment. The exact situation was presented in this case except that the number of crimes involved was fourteen instead of seven, and, furthermore, the very difficulty under which counsel for plaintiff in error was forced to labor was expressly pointed out to the court at the beginning of the trial. This can be readily seen at page 48 of the transcript where counsel for plaintiff in error stated as follows:

> "So I may conduct my cross-examination properly and understand the position of the court, I wish to ask at this time what particular day you will instruct the jury, if they shall find a verdict against the defendant, on what particular date they must find the fish were wasted."

The court in the Flaherty case lays stress upon the fact that, at the close of the case for the People, the trial court stated that it would entertain a motion to compel the prosecution to elect as to which offense was covered by the indictment. The exact situation is presented upon page 85 of the transcript as follows:

> "By the COURT. Before plaintiff closes its case I think it should be required to elect on what date it will stand for a conviction in this case. On what date it will elect to try the charge of wanton destruction of fish, and the jury will be instructed that the testimony of other and similar offenses on other dates is admitted only for the purpose of explaining the entire situation or transaction and for the purpose of showing the intent and motive with which the defendant acted in the matter of

> the charge when the offense relied upon for a conviction was committed, if committed at all. Now if you will elect what date you desire to stand on, Mr. Munly——
>
> Mr. MUNLY. Since the court has announced the law in the case to that extent I will elect the 28th day of July, 1913, to stand upon."

It would thus seem that *People v. Flaherty* is absolutely conclusive of the present matter. Nevertheless, not desiring to ask this court to base its decision upon one case alone, we advance to the consideration of further authorities.

In *Fields v. Territory of Wyoming,* 1 Wyoming 78, the same question was also involved. In that case the defendant was indicted under a statute prohibiting the permitting of a certain game of chance to be dealt in a house under his control, etc. The indictment alleged that the defendant, on the first day of January and on divers other dates and times, before and since that day, unlawfully did keep and deal, and permit to be kept and dealt in a building under his control, a certain game of chance, etc.

Upon the trial the first witness on behalf of the prosecution testified to such an offense on or about the seventh or eighth day of January. The next witness was asked the following question by the prosecution:

> "State whether or not you ever saw any game of poker played in the building kept by or under the control of the defendant within two years next prior to the twenty-seventh day of January, 1872?"

The question was objected to upon the ground that the evidence must be confined to the particular game concerning which evidence had been already given to the jury. The evidence was admitted; the judgment was reversed and a new trial ordered upon the ground that, since the indictment could cover but one offense, the first offense proven by the prosecution was an election to ask a verdict of guilty upon that offense, and that the prosecution was from that moment bound by such election. The court, upon pages 80 and 81, spoke as follows:

> "(p. 80) It is immaterial what date is alleged as the day on which a crime was committed in an indictment, provided such day be prior to the finding of the indictment and within the time prescribed by the statute of limitations; but the rule as to proof under an indictment is not so liberal, as it must be confined to a given crime and to a given time.
>
> "For instance, in this case, the indictment may have covered either of a dozen distinct offenses under the section of the statute upon which the indictment was founded. That is, William Fields may have been guilty of keeping or dealing, or permitting to be kept or dealt in a building under his control, the particular game of poker, as prohibited by the statute, on a dozen times and occasions previous to the finding of the indictment and within the time fixed by the statute of limitations, but on the trial on the particular indictment, the prosecution should have confined the proof to one distinct offense, if more than one offense had been committed. Evidence can be only offered tending to prove one distinct offense, and when such offense has been fixed as to time and place, the proof should be confined to it alone, the rule being

> that evidence of a distinct, substantive offense, cannot be admitted in support of another offense. In this case, the prosecution, by the witness Keplinger, fixed a time when the alleged misdemeanor, as charged in the indictment was committed, and all evidence not tending to prove this alleged misdemeanor, on objection of defendant, should have been ruled out by the district court."
>
> *The State of Connecticut v. Bates,* 10 Connecticut 372.

In this case the defendant was convicted of the crime of adultery. The information charged but one offense, and the question, as tersely stated by the court was whether the prosecutor, after having given evidence of one act of adultery, would still be permitted to introduce proof of any number of acts with the same person. The court held in the negative and pointed out the viciousness of allowing such a course of procedure as follows:

> "(p. 373) The accused comes prepared to defend against a single charge. This he may do successfully—and having done so, may find himself overwhelmed, by a multitude of others, of which the information gave him no notice and against which he cannot be prepared. And the prosecuting attorney, instead of shaping his case, at the outset, in the most favorable manner, may detain the court and jury by proving any number of offenses, and then elect upon which to claim a conviction. And why should this be done? He is supposed to be in possession of the proofs, and should make his election from the first. In this there can be no hardship; and such is the well settled rule in all analogous cases.

> "Thus, in an action of assault and battery, if the declaration contains but one count, the plaintiff, after proving one assault, cannot waive that and proceed to give evidence of another. 3 Stark. Ev. 1440. Stante v. Pricket, 1 Campb. 473. Burgess v. Freelove, 2 Bos. & Pul. 425. 2 Phill. Ev. 143."

In *People v. Williams*, 65 Pacific 323, the Supreme Court of California had occasion to pass upon the same point. That was a case where the defendant had been convicted of rape, and, although more extreme than the present case in that the trial court later allowed the jury to find the defendant guilty on any one of numerous offenses, still the rule as laid down would prohibit any such course of procedure as was allowed in the present matter, for Temple, J., speaking for the court, expressed himself as follows:

> "(p. 325) * * * I think the prosecuting officer, when he commences the trial of a case of this class, where he is at liberty to prove one of several different offenses under the indictment, should at least as early as the commencement of the trial inform the defense upon proof of what specific offense he intends to rely; and, if he does not, the first evidence which would tend in any degree to prove an offense shall be deemed a selection, and, unless that precise offense is proven, the defendant is entitled to an acquittal. Even this would leave a defendant in such cases at a disadvantage, but he ought not to be tried under less favorable circumstances. The judgment and order are reversed, and a new trial ordered."

Wickard v. State, Alabama, (1896) 19 Southern 491, involved a conviction of defendant for

gambling and the prosecution, after introducing evidence of one offense was allowed, by the trial court, over the defendant's objection, to introduce evidence as to a subsequent offense. The case was reversed by the Supreme Court of Alabama upon the ground that, by introducing evidence of the first offense, the prosecution had elected to abide by that offense in asking a conviction. The court spoke as follows:

> "(p. 492) When the state introduced evidence to show that the defendant played at a game of cards and bet money thereat, at Neal Burns' house on a Saturday in December, 1891, it thereby elected to prosecute for that offense; and it was not competent thereafter to introduce evidence of other and distinct offenses, comprehended within the indictment, committed by the defendant at the same or other places. Smith v. State, 52 Ala. 384."

The Supreme Court of Alabama, prior to the last mentioned case, had had occasion to pass upon the same question in *Cochran v. State*, 30 Alabama 542, where the defendant had been convicted under a similar statute. Substantially the same set of facts were presented and the holding was the same. The pertinent part of that decision is found at the bottom of page 546 and is as follows:

> "Under such indictment, the election of the State is made by introducing evidence of any act charged in it; and after introducing evidence of any such act, the State cannot give evidence of any other act charged. * * * Elam v. The State, 26 Ala. 48; 2 Greenlf. on Ev. Sec. 86; Stante v. Prickett, 1 Camp. 473;

> Gillon v. Wilson, 3 T. B. Mon. 217. 'If the prosecuting officer deems it for the interest of the State that evidence as to different offenses should be offered, he must frame the indictment accordingly; which is in every case very easily done. * * * Elam v. The State, 26 Ala. 48. But, under the indictment in this case, the court below erred in admitting the evidence as to the playing in the bed-room of the defendant's shop, after the State had introduced evidence as to the playing in the room over the barber's shop."

In *Richardson v. The State,* 63 Indiana 192, the Supreme Court of Indiana considered the same question in a case involving an assault and battery for which the defendant had been convicted. The State had attempted to first prove one assault and battery and then, by other evidence, establish a distinct and separate assault and battery, performed by the defendant upon the same person. This the trial court allowed the prosecution to do, but, upon appeal, the case was reversed, the Supreme Court holding that once the prosecution had presented evidence of an offense within the terms of the indictment, it had elected to stand upon that offense and could not later abandon the same and elect to proceed upon a new offense.

The Supreme Court of Michigan in *People v. Clark,* 33 Michigan 112, discussed the principle for which we are contending as follows:

> "(p. 114) It was decided in People v. Jenness, 5 Mich. 327, that the prosecution, before the evidence was introduced, could select any one act of criminal intercourse, such as was

charged in the information, which occurred within the jurisdiction of the court and within

The following cases are also to
same effect:

Elam v. State, 26 Ala. 46.
People v. Jenness, 5 Mich. 3
Newsom v. Commonwealth, 140
People v. Castro, 133 Cal. 1
People v. Bartnett, 15 Cal, A
State v. Murphy, 9 Lea 375 (

that the court erred in refusing to
Government to expressly elect upon which offense it relied, and that furthermore in the absense of such election the law designated the offense of July 26th as the only one for which plaintiff in error could be tried.

No doubt it will be urged against this contention that the express election by the Government made at the close of the Government's case, whereby it chose the 28th day of July, superseded and annulled the effect of the election designated by law. The answer to this argument is, that the damage already had been done, for plaintiff in error had been forced to prepare for the defense of fourteen distinct offenses, and upon cross-examination of the Government's witnesses had been obliged not only to cross-examine as to the one offense covered by the indictment, but as to thirteen others. No better statement of the hardship placed upon plaintiff in error can be found than in *People v. Flaherty* (see supra).

Gillon v. Wilson, 3 T. B. Mon. 217. 'If the prosecuting officer deems it for the interest of

Supreme Court of Indiana considered the same question in a case involving an assault and battery for which the defendant had been convicted. The State had attempted to first prove one assault and battery and then, by other evidence, establish a distinct and separate assault and battery, performed by the defendant upon the same person. This the trial court allowed the prosecution to do, but, upon appeal, the case was reversed, the Supreme Court holding that once the prosecution had presented evidence of an offense within the terms of the indictment, it had elected to stand upon that offense and could not later abandon the same and elect to proceed upon a new offense.

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> "(p. 114) It was decided in People v. Jenness, 5 Mich. 327, that the prosecution, before the evidence was introduced, could select any one act of criminal intercourse, such as was

> charged in the information, which occurred within the jurisdiction of the court and within the period of the statute of limitations, but when evidence had been introduced tending directly to the proof of one act, for the purpose of procuring a conviction upon it, the prosecutor had thereby made his election and could not be allowed to prove any other act of the kind as a substantive offense upon which a conviction might be had in the cause."

Applying the rule laid down by the foregoing authorities to the case at bar, we find first of all that the court erred in refusing to direct the Government to expressly elect upon which offense it relied, and that furthermore in the absense of such election the law designated the offense of July 26th as the only one for which plaintiff in error could be tried.

No doubt it will be urged against this contention that the express election by the Government made at the close of the Government's case, whereby it chose the 28th day of July, superseded and annulled the effect of the election designated by law. The answer to this argument is, that the damage already had been done, for plaintiff in error had been forced to prepare for the defense of fourteen distinct offenses, and upon cross-examination of the Government's witnesses had been obliged not only to cross-examine as to the one offense covered by the indictment, but as to thirteen others. No better statement of the hardship placed upon plaintiff in error can be found than in *People v. Flaherty* (see supra).

It thus being fully established both by principle and authority that in the present matter the plaintiff in error was tried, if at all, for an offense occurring upon July 26th, it only remains, in order to fully realize that plaintiff in error was found guilty of another and different crime, to refer to the election made by the Government on page 85 of the transcript as follows:

> "Since the court has announced the law in the case to that extent, I will elect the 28th day of July, 1913, to stand upon."

And to Instruction 5, found upon pages 122 and 123 of the transcript as follows:

> "The jury are instructed that although the indictment in this case charges the unlawful destruction of salmon to have been committed on the 30th day of July, 1913, the plaintiff has elected to stand for a conviction upon another date, to wit, the 28th day of July, 1913, and you are instructed that the plaintiff can do this, and you are to consider the charge as though the indictment charged the commission of the offense to have occurred on the said 28th day of July, 1913.
>
> There has been some evidence introduced of other like offenses on other dates. The evidence was admitted only as showing a long course of conduct and as it may tend to throw light on and explain the whole situation, or transaction, between the defendant and the prosecuting witness, or the witness March, and for the purpose of showing the intent, purpose or motive of the defendant, whether wanton, reckless or otherwise, as concerns the offense charged to have been committed on the said 28th day of July, 1913.

> And you are instructed that you will not consider the evidence of other offenses than that alleged to have been committed on the 28th day of July, 1913, as providing the alleged offense, if you find it was committed on said last-named date, but only as such evidence may tend to show motive, intent and purpose as above set forth."

We have therefore the following situation presented in this case: The plaintiff in error was charged in the indictment with but one offense. The Government was erroneously allowed to establish fourteen distinct offenses, without electing upon which of the fourteen it relied. Due to the failure of the Government to elect, the law elected the offense committed upon the 26th day of July, 1913. The Government was allowed at the close of its case to depart from the election made by the law and rely upon the offense occurring upon July 28, 1913. For the offense occurring on July 28, 1913, the plaintiff in error was convicted. Under these circumstances, it must be manifest to this court that the plaintiff in error was tried for a crime for which it was not convicted, and convicted for a crime for which it was not tried. The error thus committed is patent. It demands no further citation of authority or discussion of principle. But one conclusion can follow—the judgment of conviction must be set aside.

Dated, San Francisco,
May 9, 1917.

Respectfully submitted,

GEORGE H. WHIPPLE,
EVAN WILLIAMS,
DONALD Y. LAMONT,

No. 2927.

IN THE

UNITED STATES

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

May Term, 1917

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,

vs.

ALASKA PACKERS ASSOCIATION, a Corporation,
Defendant and Plaintiff in Error.

BRIEF OF PLAINTIFF-DEFENDANT IN ERROR

UPON APPEAL FROM THE DISTRICT COURT
FOR THE TERRITORY OF ALASKA,
THIRD DIVISION.

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STATEMENT OF CASE.

This appeal arises from an indictment found by the Grand Jury of the Territory of Alaska, Third Division, and filed in the District Court of said Territory and Division on October 14, 1914, for violation of Section 266, Compiled Laws of Alaska of 1913, page 197, which indictment is as follows:

"The Alaska Packers Association, a corporation, is accused by the grand jury of the Territory of Alaska, Division Number Three, by this indictment, of the crime of Wanton Waste of Salmon, committed as follows:

The said Alaska Packers Association, on the

thirtieth day of July, nineteen hundred and thirteen, in the Territory and Division aforesaid, being then and there a corporation organized and existing under the laws of the State of California, unlawfully and wantonly did waste and destroy a large number of salmon, which salmon then and there had been taken and caught in the waters of Alaska, to-wit, at a point in the waters of Cook Inlet, near the western shore of said Inlet between the mouth of the Kuskatan River, and the West Foreland in said Territory and Division, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Dated at Seward, in the Territory and Division aforesaid, the fourteenth day of October, nineteen hundred and fourteen." (Transcript of Record, page 4.)

Thereafter motion to set aside and quash said indictment and a demurrer thereto were filed by the defendant both of which were overruled by said District Court on April 2, 1915. A trial of said cause was called and had in said District Court on September 16, 1916, before a jury regularly empaneled, which trial resulted in a verdict of guilty brought in by said jury, and thereafter after a motion for arrest of judgment and for a new trial had been denied the court on October 14, 1916, pronounced sentence and judgment against the defendant by the imposition of a fine of Two Hundred ($200.00) Dollars, said fine to include all costs.

The indictment as will be seen fixed the 30th day

of July, 1913, as the date of the commission of the offense, and the court after admitting testimony on behalf of the prosecution of the wanton waste and destruction of salmon on several days in the latter part of July, 1913, and also in the early part of August, 1913, compelled the prosecution to elect to fix a date for the commission of the offense, which election made by the prosecution fixed as said date the 28th day of July, 1913.

The instructions given to the jury by the Court at the conclusion of the testimony and after argument by the respective counsel were as follows:

INSTRUCTIONS OF THE COURT.

"*Gentlemen of the Jury*:

In this case the defendant, the Alaska Packers' Association, a corporation, is charged by the indictment with wantonly wasting and destroying salmon in the waters of Cook Inlet, in the Third Division of Alaska, on the 30th day of July, 1913.

2.

Section 266 of the Compiled Laws of Alaska provides that it shall be unlawful for any person, company or corporation wantonly to waste or destroy salmon, or other food fishes, taken or caught in any of the waters of Alaska.

You are instructed that while intent is an essential ingredient of every crime and that no crime can be committed without the intent so to do, still everyone is presumed to know and to intend the necessary, natural and probable consequences of his acts.

The word "Wantonly," as used in this statute, means without excuse or justification; having a reckless disregard of consequences; heedless of results and the rights of others.

The words "waste" and "destroy" are used in this statute in their ordinary significance—to suffer or permit to go to waste and be destroyed; not saved or put to any good or useful purpose.

3.

Section 265, Compiled Laws of Alaska, reads as follows:

It shall be unlawful to can or salt for sale for food any salmon more than forty-eight hours after it has been killed.

4.

It is admitted that the defendant is a corporation organized under the laws of the State of California, and you are instructed that a corporation acts only through some officer, agent, representative or person, and you are further instructed that the witness Williams is admitted to be the superintendent of said defendant corporation, and as such, his acts and agreements in relation to the trap and fish testified to in this case are binding on said defendant company.

At the request of the defendant I give you the four instructions following:

Defendant's Instruction A.

The indictment in this case charges the defendant with destroying a large number of salmon. Now you are instructed that before the defendant can be

convicted of the charge it must be proven to your satisfaction, beyond all reasonable doubt, that the defendant unlawfully and wantonly wasted or destroyed a large number of salmon, that is, a considerable number. To sustain a conviction of the defendant it is not sufficient to prove that some salmon were wasted or destroyed, such as might incidentally be wasted and destroyed in the operation of a large cannery.

Defendant's Instruction B.

This instruction is given subject to the qualifications mentioned in Instruction Number 8.

You are instructed that if you believe from the evidence that at the time the defendant corporation supplied Hunter and March with a portion of the fishing gear for the construction of the trap at West Foreland, that Captain Williams acting on behalf of said corporation stated to Hunter that in case the company did not take all of the fish that would be caught in the trap that he, Hunter, must take care of the fish, either by salting or drying them and not permit them to spoil, then you must find the defendant not guilty.

Defendant's Instruction C.

This instruction is given subject to the qualifications mentioned in Instruction Number 8.

I instruct you that if you believe from the evidence that at the time the defendant corporation delivered to Hunter a portion of the gear used in connection with the fishing-trap in question that it was understood between Captain Williams, acting for the defendant corporation, and William Hunter, that in

case the company's boat did not call for any fish within the time allowed by law for canning fish after they were taken from the water, that Hunter and March were to dry or salt the fish for their own account, then you must find the defendant Not Guilty.

As I have stated, these last two instructions that I have read to you are to be read in connection with Instruction Number 8 as I will read it to you hereafter.

Defendant's Instruction D.

The defendant in this case is a corporation, but you are cautioned not to allow such fact to prejudice or bias you in this case either in favor of or against the defendant. You are instructed to consider the evidence in this case in the same manner as you would if the defendant were an individual.

5.

The Jury are instructed that although the indictment in this case charges the unlawful destruction of salmon to have been committed on the 30th day of July, 1913, plaintiff has elected to stand for conviction upon another date, towit, the 28th day of July, 1913, and you are instructed that the plaintiff can do this, and you are to consider the charge as though the indictment charged the commission of the offense to have occurred on said 28th day of July, 1913.

There has been some evidence introduced of other like offenses on other dates. The evidence was admitted only as showing a long course of conduct and as it may tend to throw light on and explain the whole

situation, or transaction, between the defendant and the prosecuting witness, or the witness March, and for the purpose of showing the intent, purpose or motive of the defendant, whether wanton, reckless or otherwise, as concerns the offense charged to have been committed on the said 28th day of July, 1913.

And you are instructed that you will not consider the evidence of other offenses than that alleged to have been committed on the 28th day of July, 1913, as proving the alleged offense, if you find it was committed on said last-named date, but only such evidence may tend to show motive, intent and purpose as above set forth.

7.

You are instructed that if you believe from the evidence, beyond a reasonable doubt, that the defendant company made an agreement or arrangement with the witness March, or March and Hunter, to call for and take all salmon caught in said trap near Kuskatan, during the fishing season of 1913, and that said defendant recklessly and wantonly (as defined to you in these instructions) failed and neglected to call for or take said fish and thereby suffered and permitted said salmon to be wasted and destroyed, then you should find the defendant guilty as charged in the indictment.

If, however, you believe from the evidence that the defendant company did not agree to call for all the salmon during the fishing season of 1913, at said trap near Kuskatan and take the same from the witness March, or March and Hunter, then you should

find the defendant Not Guilty.

The last two paragraphs are to be considered by you in connection with the following statement of the law concerning contracts for the trapping or catching of salmon, to-wit:

8.

A cannery company may lawfully enter into a contract with any person to take all or any part of the salmon caught in a trap or otherwise by such person, providing such person has opportunity, means or facilities for taking care of, using or disposing of any portion of the salmon remaining after the cannery company has taken such salmon as it wants, or such cannery company has no reason to doubt such is the case; but such contract cannot lawfully be made so as to relieve such cannery company from liability if said cannery company, in making said contract, has knowledge that such person is using a trap which during the run of salmon will catch large numbers of salmon each tide, and such person has no means, opportunity or facilities for using or disposing of said salmon, except to the cannery company entering into said agreement, by loading said salmon on boats furnished by such cannery company, and that if such cannery company does not call for said salmon with its boats, said salmon, or a considerable portion thereof, will have to be thrown away, wasted and destroyed, and so knowing, such cannery company fails to send for the salmon and a considerable quantity thereof has to be thrown away, wasted and destroyed in consequence.

9.

In this case, as in all criminal cases, the jury and the Judge of the Court have separate functions to perform. It is your duty to hear all the evidence, all of which is addressed to you, and thereupon to decide and determine the questions of fact arising from the evidence. It is the duty of the Judge of this Court to decide the questions of law involved in the trial of the case, and the law makes it your duty to accept as law what is laid down as such by the Court in these instructions. But your power of judging the effect of the evidence is not arbitrary, but to be exercised with legal discretion and in subordination to the rules of evidence.

10.

Your duty to society and this defendant obligates each of you to give your earnest and careful attention and consideration to every feature of the case now on trial before you, so that the defendant may not be unjustly convicted nor wrongfully acquitted. Under the solemnity of your oaths as jurors you must consider all of the evidence in the case under the law given to you by the Court in these instructions; and upon the law and evidence you must reach, if you can, a just verdict, which the law and the rights of the defendant demand of you; and in determining the guilt or innocence of the defendant it becomes your duty to accept the law of the case as given to you by the Court in these instructions.

11.

It is your duty to give to the testimony of each

and all of the witnesses such credit as you consider their testimony justly entitled to receive; and in doing so, you should not regard the remarks or expressions of counsel, unless as the same are in conformity with the facts proved, or are reasonably deducible from such facts and the law as given to you in these instructions.

12.

You are instructed that the evidence is to be estimated not only by its own intrinsic weight, but also according to the testimony which it is within the power of one side to produce and of the other side to contradict; and, therefore, if the weaker and less satisfying evidence is produced when it appears that it was within the power of the party offering the same to produce stronger and more satisfying evidence, such evidence, if so offered, should be viewed with distrust.

13.

You are instructed that you should not consider any evidence sought to be introduced but excluded by the Court, nor should you consider any evidence that has been stricken from the record by the Court, nor should you consider in reaching your verdict any knowledge or information known to you not derived from the evidence as given by the witness upon the witness stand.

You should not allow prejudice or sympathy to swerve you in reaching a verdict according to the evidence and the law as given you by the Court. Whatever verdict is warranted under the evidence and the

instructions of the Court, you should return, as you have sworn so to do.

The character and degree of the punishment is to be determined by the Court, within the limits fixed by law and you are instructed that you should not consider the matter of the punishment in making up your verdict.

14.

You are instructed that you are the sole judges of the credibility of the witnesses appearing before you, and of the reasonableness of their testimony, and of the weight to be given their evidence.

The law also makes it my duty to instruct you that you are not bound to find in conformity with the testimony of any number of witnesses which does not produce conviction in your minds, against a less number, or against a presumption of other evidence, satisfying your minds. You are also instructed that a witness who is wilfully false in one part of his testimony may be distrusted by you in other parts. If you find that any witness in this case has testified falsely in one part of his testimony, you are at liberty to reject all or any part of his testimony, but you are not bound to do so. You may reject the false part and give such weight to other parts as you think they are entitled to receive.

15.

This defendant is presumed to be innocent of the charge against it until it is proved to be guilty beyond a reasonable doubt by the evidence produced in this case and submitted to you. This presumption of in-

nocence is a right guaranteed to the defendant by law and remains with it, and should be given full force and effect by you, until such time in the progress of this case as you are satisfied of its guilt from the evidence beyond a reasonable doubt.

You are instructed that the indictment in this case is not to be taken or considered by you as any evidence against the defendant, but as merely a charge or allegation brought against it.

16.

The term "reasonable doubt" as defined by the law and as used in these instructions means that state of the case which, after a careful comparison and consideration of all the evidence in the case, leaves the minds of the jury in that condition that they cannot feel an abiding conviction, amounting to a moral certainty, of the truth of the charge. The term "reasonable doubt" does not mean every doubt but such a doubt must be actual and substantial, as contradistinguished from some vague apprehension and must arise from the evidence, or from the want of evidence, or from such sources. A reasonable doubt is not a mere whim, but is such a doubt as arises from a careful and honest consideration of all the evidence in the case; and the evidence is sufficient to remove all reasonable doubt when it convinces the judgment of ordinarily prudent men of the truth of a proposition with such force that they would act upon the conviction without hesitancy in their own most important affairs. Proof beyond all reasonable doubt does not mean proof beyond every doubt. Absolute certainty

in the proof of a crime is rarely obtainable, and never required.

17.

I hand you herewith two forms of verdict, one finding the defendant guilty as charged in the indictment, and the other finding the defendant not guilty.

You may take with you these instructions for your guidance, and when you have unanimously agreed upon your verdict, you will sign the one you find, by your foreman, and return it into court; the other you will destroy." (Transcript of Record, pages 119 to 129.)

QUESTIONS INVOLVED.

The principal points raised by the assignments of error made by the defendant-plaintiff in error may succinctly be resolved as follows:

First: Insufficiency of the Indictment raised by the defendant's demurrer especially in the following particulars: "That the acts and omissions charged are not set forth in such a manner as to enable a person of common understanding to know what is intended," and "That said indictment is defective because of ambiguity, duplicity, multifariousness, and because the same is involved and lacks that certainty of averment requisite in order to inform the defendant of the nature of the facts, or the character of the evidence which it will be required to meet upon the trial of the specific charge attempted to be made."

Second: That error was committed by the Court in permitting the plaintiff-defendant in error

at the conclusion of the introduction of the Government testimony to elect July 28, 1913, as the date of the commission of the offense, and in not compelling the election of July 26, 1913, by implication of law.

Third: That error was committed by the Court in denying defendant's motion to the effect that Hayward March and William J. Hunter were independent contractors, and that the testimony disclosed that the trap alleged to be operated by them was entirely under their control, and that therefore defendant was not liable for any destruction or waste of fish at said trap.

Fourth: That the witnesses for the Government, Hayward March and William J. Hunter were accomplices in the commission of the crime charged against the defendant, and the jury should have been instructed as to the necessity of corroboration.

Fifth: That the Court erred in the definition in his instructions to the jury of what constituted a wanton waste of fish and as to the meaning of the word "wantonly."

POINTS AND AUTHORITIES.

The indictment followed the language of the statute and gave sufficient particulars to apprise the defendant of the offense charged, so preparation could be made for defense and to enable defendant to use it as a plea of former jeopardy.

Sections 2147 and 2149 Compiled Laws of Alaska, 1913.

United States v. Fitzpatrick, 178 U. S. 308.

United States v. Jackson, 102 Fed. 473.

United States v. Stockslager, 116 Fed. 590.

United States v. Booth, 197 Fed. 283.
United States v. Potter, 155 U. S. 438.
State v. Spencer, 6 Or. 153.
State v. Brown, 7 Or. 199.
State vs. Dilley, 15 Or. 73, 13 Pac. 648.
State v. Childers, 32 Or. 122, 49 Pac. 801.
State v. Ah Lee, 18 Or. 540, 23 Pac. 424.

Evidence of other offenses admissible to show intent, purpose, motive, knowledge and shed light on the whole situation.

Kettenbach v. United States, 202 Fed. 383.
United States v. Lillis, 190 Fed. 530.
United States v. Dillard, 141 Fed. 303.
United States v. Jones, 179 Fed. 584.
United States v. Jones, 162 Fed. 417.
United States v. Van Gesner, 153 Fed. 46.
12 Cyc. 407.

That no error was committed in permitting the prosecution to elect July 28, 1913, as the date of the commission of the offense charged, and that under the testimony and circumstances of the case, the court was invested with discretion as to the date of election, and there was no abuse thereof.

Bishop's Criminal Procedure (Second Edition 1913), Vol. 1, Section 461, paragraph 4.
State v. Parish, 104 N. C., 10 S. E. 457.
State v. Harris, 154 Pac., 198.
State v. Poull, 105 N. W. 717.
Angeloff v. State, 110 N. E. 936.
Carter v. State, 181 S. W. 473.
State v. Roby, 150 N. W. 793.
State v. Schueller, 120 Minn. 26, 138 N. W. 937.
State v. Acheson, 91 Me. 240, 39 Alt. 570.
State v. Hughes, 35 Ala. 351.
State v. Smith, 22 Vt. 74.
Com. vs. O'Connor, 107 Mass. 219.
State v. Stockwell, 27 Ohio St. 563.
Rex. v. Hart, 7 Car. & P. 652 .

State v. Bartley, 53 Neb. 310, 73 N. W. 744.
State v. Simms, 10 Tex. Ap. 131.
State v. Long, 56 Ind. 182.
State v. Sims, 3 Strob. 137.
Rex. v. Galloway, 1 Moody 234.
Reg. v. Braun, 9 Cox C. C. 284.
Com. v. Pierce, 11 Gray, 447.
State v. Shores, 31 W. Va. 491.
State v. Carragin, 210 Mo. 351, 109 S. W. 553.

Where evidence is directed to one particular class of offenses under a statute and no other is admitted, there need be no election.

People v. Leonard, 81 Ill. 308.

Where an offense is continuous in its nature, evidence with regard to its commission at different times within the general charge does not demand an election.

State v. Etress, 88 Ala. 191, 7 So. 49.
State v. Owens, 74 Ala. 401.
Com. v. Sullivan, 146 Mass. 142.
People v. Elmer, 109 Mich. 493.

Where distinct criminal acts form a series which is readily susceptible of proof, while proof of any particular act might be difficult, it is held that the State need not elect.

State v. Higgins, 121 Iowa 19.
State v. Memmler, 75 Ga. 576.

The claim that March and Hunter were independent contractors, in the operation of the trap, thereby exempting defendant corporation from liability for wanton waste of fish untenable, for the reason defendant could not enter into any contract which would necessarily contemplate the violation of the law.

Carico v. West Va. Central & P. Ry. Co., 39 W. Va., 86, 19 S. E. 571, 24 L. R. A. 50.
Covington & C. Bridge Co. v. Steinbrock, 76 Am. St. Rep. 375.
St. Louis & S. F. R. Co. v. Madden, 17 L. R. A. (N. S.) 791 with cases cited.
Fowler v. Saks, 7 L. R. A. 653.
26 Cyc. 1557 *et seq.*
Colgrove v. Smith, 102 Cal. 220, 36 Pac. 411, 27 L. R. A. 590.
Woodman v. Metropolitan R. Co., 149 Mass. 335, 21 N. E. 482, 4 L. R. A. 213.
Ackles v. Pac. Bridge Co., 66 Or. 110, 133 Pac. 781.

March and Hunter were not accomplices; did not aid, assist, advise, or encourage in the commission of the crime charged, or have any corrupt co-operation therein.

Definition of and general rule for determining who is an accomplice.

United States v. Holmgren, 156 Fed. 444.
People v. Bolanger, 71 Cal. 19.
Wharton Crim. Evidence 440.
State v. Clapp, 94 Tenn. 186.
State v. Roberts, 15 Or. 197.
State v. Umble, 115 Mo. 461.
State v. Keller, 102 Ga. 511.
1 Am. & Eng. Ency. Law (2nd Ed.) 389.
State v. Collum, 122 Cal. 186.
State v. Giles, 43 Tex. Crim. App. 563.
People v. Coffey, 39 L. R. A. (N. S.) 707.
State v. Duff, 144 Iowa 142; 122 N. W. 829; 138 Am. St. Rep. 274 with large note.
United States v. Diggs, 220 Fed. 545.
State v. Stone, 85 S. W. 808.

Definition of word "wantonly" in instructions of Court was broad, and is more than sustained by authorities.

Strough v. Central Ry. Co. of New Jersey, 209 Fed. 26.
Hazle v. Railroad Co., 173 Fed. 431.
Natl. Folding Box Co. v. Robertson's Estate, 125 Fed. 524.
Cleveland C. C. & St. L. Ry. Co. v. Tartt, 64 Fed. 823.
Conchin v. El Paso & S. W. Ry. Co., 108 Pac. 260.
Kelly v. Stewart, 93 Mo. App. 47.
State v. Brigham, 94 N. C. 888.
Ex Parte Birmingham Realty Co., 63 So. 67.
Seago v. Paul Jones Realty Co., 170 S. W. 372.
Merrill v. Sheffield Co., 53 So. 219.
Adler v. Marit, 59 So. 597.
Vessel v. Seaboard Air Line Co., 62 So. 180.
Tolleson et al. v. Southern Ry. Co., 70 S. E. 314.
Cobb v. Bennett, 75 Pa. St. 326.
Welch v. Durand, 36 Conn. 182.

ARGUMENT.

SUFFICIENCY OF THE INDICTMENT.

The first matter for discussion in this appeal is the sufficiency of the indictment, and we claim that under the statutes of Alaska, a slight examination of said indictment will demonstrate its sufficiency.

It will be admitted that the requirements of an indictment will be governed by the procedure as provided by the Compiled Laws of Alaska of 1913.

United States v. Summers, 231 U. S. 137.
United States v. John Wigger, 235 U. S. 276.

Section 2147 of said Compiled Laws provides as follows:

"Sec. 2147. That the indictment must contain:

First. The title of the action, specifying the

name of the Court to which the indictment is presented and the names of the parties.

Second. A statement of the facts constituting the offense in ordinary and concise language without repetition, and in such manner as to enable a person of common understanding to know what is intended."

Section 2149 of the same compilation, reads as follows:

"Section 2149. That the manner of stating the act constituting the crime, as set forth hereinafter, is sufficient in all cases where the forms there given are applicable, and in other cases forms may be used as nearly similar as the nature of the case will permit."

The forms prescribed as referred to are of the simplest kind, and in each case nearly follow the statutory language defining the crime. These sections of the Compiled Laws were taken from Oregon, and are the same as referred to in the Alaska case of *United States v. Fitzpatrick* 178 U. S. 306, which says referring to the Section of the Oregon Code from which Section 2147 of the Compiled Laws of Alaska was copied, "This section was doubtless intended to modify to a certain extent the strictness of the common law indictment, and simply to require the statement of the elements of the offense in language adapted to the common understanding of the people, whether it would be regarded as sufficient by the rules of the common law or not." That was a case of murder, and the Court after a further discussion of the criticism aimed at the indictment, said "we are bound to give some effect to the provisions of Section 1268 (Sec. 2147, Alaska Code) in its evident purpose to

authorize a relaxation of the extreme stringency of criminal pleadings, and make that sufficient in law which satisfied the 'common understanding' of men." If the simple, direct manner of charging a crime of the enormity of murder, provided by the code is sufficient, surely no greater certainty can be demanded in the case of a misdemeanor as involved in the indictment under discussion, especially as Section 2149 provides that "in other cases forms may be used as nearly similar as the nature of the case will permit." There is no form, of course, prescribed for an indictment for the violation of the law in the present instance, but it will be sufficient if it follows the lines of the other simplified forms of the Alaska code.

As the case of *United States v. Fitzpatrick* (*supra*) directs attention to the Oregon law and the interpretation thereof by the highest court of that State for the requisites of an indictment, the following Oregon cases hold that the simplified forms given in the statute are sufficient in cases covering various violations of the criminal law of that state.

State v. Ah Lee, 18 Ore. 540, 23 Pac. 424.
State v. Childers, 32 Or. 122, 49 Pac. 801.
State v. Dilley, 15 Or. 73, 13 Pac. 648.
State v. Spencer, 6 Or. 153.
State v. Brown, 7 Or. 199.
State v. Lee Yan Yan, 10 Or. 366.

The law upon which the present indictment is based is Section 266, on page 199, of the Compiled Laws of Alaska, 1913, as follows:

> "That it shall be unlawful for any person, company or corporation wantonly to waste or destroy salmon or other food fishes taken or caught

in any of the waters of Alaska."

An inspection of the indictment will show that it alleges that the defendant is a corporation organized under the laws of the State of California, that on the 30th day of July, 1913, it unlawfully and wantonly did waste and destroy a large number of salmon, which salmon then and there had been taken and caught in the waters of Alaska, to-wit, at a point in the waters of Cook Inlet near the western shore of said Inlet between the mouth of the Kustatan River, and the West Foreland in said Territory.

It will be seen that it makes a definite charge under the language of the Statute, fixing the place, time and number of fish destroyed and under all the requirements of the Oregon cases and the Fitzpatrick case (supra), it furnishes the accused with a definite description of the offense so as to enable it to avail itself of the plea of former jeopardy and to inform the Court whether the facts were sufficient in law to support a conviction.

This Court held that the crime may be charged in the language of the Statute in the following cases:

United States v. Jackson, 102 Fed. 473.

United States v. Stockslager, 116 Fed. 590,

and in

United States v. Booth, 197 Fed. 283

this Court has given an emphatic approval of directness and simplicity in criminal pleading.

Even in the United States Courts not governed

by the simplified procedure as controls in this case, the following language was employed in *United States v. Potter* 155 U. S. 443, by Justice Brewer in describing the essentials of an indictment for a statutory offense:

"The offense charged is a statutory one, and while it is doubtless true that it is not always sufficient to use simply the language of the statute in describing such an offense (*U. S. v. Carll*, 105 U. S. 611) yet if such language is according to the natural import of the words fully descriptive of the offense, then ordinarily it is sufficient."

There can be no mistake of the clear import of the words employed in this statute that it shall be unlawful wantonly to waste or destroy salmon or other food fishes taken or caught in any of the waters of Alaska, and when the kind, number, and place are described there can be, it seems to us, no doubt of the sufficiency of the indictment.

In these later days both statutes and courts have recognized the necessity and reasonableness of relaxing the rigidity of the ancient requirements of criminal pleading, and have in passing on indictments been governed by the rule that while the accused should be fairly apprised of the charge, so that intelligent preparation may be made to meet it, and so that one would be enabled afterwards to use it as a shield, still hypercritical objections, unimportant defects, and even im-

perfection of statement which do not reasonably tend to prejudice the accused should be ignored and disregarded.

In view of this reasonable standard fixed for indictments and of its positive recognition made by Sections 2147 and 2149 of the Alaska Code, there is no merit to the objection made to the indictment in the present instance.

ELECTION OF THE DATE OF OFFENSE.

The next matter urged by the defendant as error was in the trial of the cause, which took place on September 16, 1916, in the election made by the prosecution of the date upon which to rely for the commission of the offense, which date was fixed as July 28, 1913, the alleged error being raised by various motions and exceptions on the part of the defendant.

At the trial, the prosecution introduced as witnesses to sustain the charge, Hayward March and William J. Hunter, whose testimony of the fish wasted and destroyed will be seen by reference to the transcript of evidence. That testimony shows that a varying number of fish were wasted and destroyed on several days beginning with July 26, 1913, and continuing up to August 8, 1913, on account of the failure of the defendant to send its boat to convey the fish to its cannery.

Objections were made by counsel for the defendant to the introduction of this testimony, showing the number of salmon wasted and thrown away on

different dates, on various grounds, that the government should be confined to the date alleged in the indictment, the 30th day of July, 1913, and that after the introduction of the first evidence tending to show a wanton waste and destruction of fish, on the 26th day of July, 1913, the government had elected as a matter of law that date for the commission and should not be permitted to introduce evidence of collateral crimes. The Court ruled at that stage of the proceedings concerning the introduction of such testimony as follows:

> "THE COURT—The evidence will be received for the purpose of throwing light on this agreement between the defendant company and the prosecuting witness, showing their methods or manner of getting these fish.
>
> MR. DONOHOE—I understand the ruling of the Court to be that evidence will go to the jury covering the period of time during which any fish were wasted there as testified to by the witness.
>
> THE COURT—Testimony will be introduced showing the entire operation of this trap, as tending to throw light on the charge in this case, that on a certain day they were wasted, showing the methods used and the calling of defendant's boats or their not calling, as the case may be and showing the entire circumstances, so it can be ascertained whether they did use reasonable diligence and care in the protection of these fish or whether they wantonly and recklessly wasted and permitted them to be destroyed—that is the question here." (Transcript of Record, pages 47 and 48.)

Then again before the plaintiff closed its case,

the Court concerning the matter ruled as follows:

"By the Court—Before the plaintiff closes its case, I think it should be required to elect on what date it will stand for a conviction in this case, on what date it will elect to try the charge of wanton destruction of fish and the jury will be instructed that the testimony of other and similar offenses on other dates is admitted only for the purpose of explaining the entire situation or transaction and for the purpose of showing the intent and motive with which the defendant acted in the matter of the charge when the offense relied upon for a conviction was committed, if committed at all. Now, if you will elect what date you desire to stand on, Mr. Munly—

Mr. Munly—Since the Court has announced the law in the case to that extent, I will elect the 28th day of July, 1913, to stand upon.

By the Court—Very well.

Mr. Donohoe—The defendant excepts to the election made by the Government at this stage of the trial, our contention being that the election should have been made at the commencement of the trial.

Mr. Munly—On account of being required to make that election, I have no further evidence to introduce. The State will rest unless the witnesses are recalled for rebuttal.

Mr. Donohoe—At this time the defendant moves the Court to strike out of the record the testimony regarding the waste or destruction of salmon at or near the place mentioned in the indictment, at any day subsequent to the 28th day of July, 1913, on the ground that it is incompetent, irrelevant and immaterial testimony.

By the Court—The objection will be overruled, or rather the motion will be denied and exception allowed. The jury will be instructed as to the effect of that evidence, that it is not for the purpose of proving the offense alleged to have

been committed on the 28th day of July, 1913, but only as it tends to show a general course of conduct and going to explain or show the motive or intent with which the defendant acted. (Transcript of Record, pages 85 and 86.)

Finally in the instructions to the jury, the Court on this same matter, gave the following instruction:

"The Jury are instructed that although the indictment in this case charges the unlawful destruction of salmon to have been committed on the 30th day of July, 1913, the plaintiff has elected to stand for a conviction upon another date, to-wit, the 28th day of July, 1913, and you are instructed that the plaintiff can do this, and you are to consider the charge as though the indictment charged the commission of the offense to have occurred on said 28th day of July, 1913.

There has been some evidence introduced of other like offenses on other dates. The evidence was admitted only as showing a long course of conduct and as it may tend to throw light on and explain the whole situation, or transaction, between the defendant and prosecuting witness, or the witness March, and for the purpose of showing the intent, purpose or motive of the defendant, whether wanton, reckless or otherwise, as concerns the offense charged to have been committed on the said 28th day of July, 1913.

And you are instructed that you will not consider the evidence of other offenses than that alleged to have been committed on the 28th day of July, 1913, as proving the alleged, if you find it was committed on said last-named date, but only as such evidence may tend to show motive, intent and purpose as above set forth." (Transcript of Record, pages 122 and 123.)

The defendant contends that the testimony shows that July 26, 1913, was first date upon which a large number of salmon were wasted, and as a matter of

law it is contended the election was irrevocably fixed by said testimony.

The prosecution on the other hand contends that inasmuch as what constitutes a large number of fish was a matter of uncertainty and was to be determined by the jury, under the instructions of the Court, it was within the discretion of the Court to permit the election as made, if an election was necessary at all.

The prosecution maintains further at the outset, that the testimony admitted by the Court of the waste of fish on the various days was entirely proper and admissible under the sound principles of the law of evidence announced at the time by the Court, to the effect that said testimony was for the purpose of showing the entire operation of the trap, as tending to throw light on the charge in the case, showing the methods used and the calling of defendant's boats or their not calling, and showing the entire circumstances, so that it could be ascertained whether they did use reasonable diligence and care in the protection of the fish or whether they wantonly and recklessly permitted them to be destroyed, further as showing the entire situation and the motive, purpose, and intent with which the defendant acted.

Nothing is better established in the law of evidence than that evidence showing intent, purpose, motive and knowledge is proper and admissible even though such evidence may tend to show or establish the commission of an additional or separate offense. See

United States v. Kettenbach, 202 Fed. 382.

United States v. Lillis, 190 Fed. 530.
United States v. Dillard, 141 Fed. 303.
United States v. Jones, 179 Fed. 584.
United States v. Jones, 162 Fed. 417.
United States v. Van Gesner, 153 Fed. 46.
United States v. Lobosco, 183 Fed. 742.
12 Cyc. 407.

The Court's view of the law of the case concerning the quantity of fish that would constitute a violation of the law may be found in the instructions to the effect that before the jury would be warranted in convicting the defendant it would be necessary that the Government should prove beyond a reasonable doubt "that the defendant unlawfully wasted and destroyed a large number of salmon, that is, a considerable number." (Transcript of Record, page 121.) This is the theory of the case as held all through the proceedings, and the prosecution was entitled therefore to unfold the different testimony as to the waste of fish on the ground of preliminary inquiries and when required to elect, to make the election of the date which would tend to establish the commission of the offense. If compelled to elect on any of the alleged earlier infractions of the law, on account of the uncertainty of the quantity destroyed necessary to constitute a crime, the Government might have no case at all and might have run the risk of an instructed verdict for the defendant. Under such circumstance, it would appear that it was properly a matter of discretion for the trial Court to permit the Government to make the election which was made, and in doing so there was no abuse of the discretion lodged

in the court under the law and under the circumstances.

Discussing the law concerning the election of dates, there is a great deal of diversity and lack of uniformity of judicial opinion, but Bishop in his New Criminal Procedure (Second Edition 1913) Vol. 1, Section 461, in paragraphs 4 and 5, gives about the clearest and ablest analysis of the various decisions and conclusions in regard thereto that have come under our observation. Bishop says:

> "In other words, ———PRELIMINARY INQUIRIES OF WITNESSES,—and a production of evidence not definable by rule, but determined by the judicial discretion in each particular instance, must first be allowed, then the Court on motion will order such an election as it deems just. Here the conflicts of opinion and practice become serious, yet they are in a measure explained by the differing circumstances of cases. Some appear to hold that after the government's evidence is all in, it is too late to ask the Court to direct the prosecuting officer to elect. Others deem this the favorite time, or even commend the waiting until the evidence on both sides is in. Another view has in part already appeared: namely, to have the election made at the opening of the cause, in the absence whereof the prosecutor will be held to have elected the first transaction which his evidence tended to prove. In this seeming conflict,———
>
> ON THE WHOLE.———while it is believed that there are some rules of law controlling all cases, in most the question of election is properly and best left to the discretion of the presiding judge, to be exercised with reference to the special facts."

Also see—

State v. Parish, 104 N. C., 10 S. E. 457.

State v. Harris, 154 Pac., 198.
State v. Poull, 105 N. W. 717.
Angeloff v. State, 110 N. E. 936.
Carter v. State, 181 S. W. 473.
State v. Roby, 150 N. W. 793.
State v. Schueller, 120 Minn. 26, 138 N. W. 937.
State v. Acheson, 91 Me. 240, 39 Alt. 570.

As the quantity to make a crime was uncertain, the Court committed no error in permitting the election of July 28, 1913.

That the testimony of the alleged violation of the law on July 26, 1913, was not an election by the government by implication of law, see

State v. Murphy, 9 Lea 373.
State v. Peacher, 61 Ala. 22.
State v. Guettler, 34 Kan. 582.
State v. Brunker, 46 Conn. 327.
State v. Hughes, 35 Ala. 351, 61, 62.

NO ELECTION REQUIRED.

We have discussed this matter of election on the theory that it was a proper case for the Court to require an election, but we are not at all convinced that the Government should have been required to elect. There are various exceptions to the rule requiring an election. For instance, it has been held that where evidence is directed to one particular class of offenses under a statute and no other is admitted, there need be no election.

People v. Leonard, 81 Ill. 308.

Where an offense is continuous in its nature, evidence with regard to its commission at different times

der these several heads of exception to the rule of election. All of the evidence was directed to a particular class and no other, the offense was continuous, and especially does the exception apply that these distinct criminal acts form a series which could be readily proved, while proof of the particular act was difficult. Under the view of the law held by the Court that a considerable number of fish would have to be wasted before a conviction would be warranted, it is difficult to select or elect the one that would come under the construction placed upon the law by the Court, and it was proper therefore to present the whole ser-

Additional cases to be inserted in Brief of the
ted States in case of the United States vs. Alaska
kers Association, No. 2927, pages 29 and 30.

ple vs. Thompson, 212 N.Y. 249, 106 N.E. 78.
This case reverses 161 App. Div., 948,
N.Y.Supp. 1106,
as the appellate Div., in the latter case relied
People vs. Robertson, 84 N.Y.Supp., 401, the case in
N.Y. practically overrules People vs. Flaherty,
N.Y. cited by the plaintiff in error.

also Com. vs. Barnes, 138 Mass. 511 and State vs.
let, 78 Vermont, 157., 62 Atl. 48.

ple vs. Thompson, 212 N.Y.[supra] holds that the
ponderance of judicial opinion now is that acts
sequent [as wellas prior to it] **** are relevant,
ject to the rule that when admissibility of evidence
ends on collateral facts, the regular course is for
trial judge to pass on the facts in the first instance
there if he admits the evidence, to instruct the jury
to its purpose and effect, see 106 N.E. page 79.

We have discussed this matter of election on the theory that it was a proper case for the Court to require an election, but we are not at all convinced that the Government should have been required to elect. There are various exceptions to the rule requiring an election. For instance, it has been held that where evidence is directed to one particular class of offenses under a statute and no other is admitted, there need be no election.

People v. Leonard, 81 Ill. 308.

Where an offense is continuous in its nature, evidence with regard to its commission at different times

within the general charge does not demand an election.

(See cases under Note 45, 22 Cyc. 408.)

"*Etress v. State*, 88 Ala. 191, 7 So. 49 (holding that in a prosecution for carrying concealed weapons, evidence of possession and concealment at different times covered by one continuous act did not require an election); *Owens v. State*, 74 Ala. 401 (trespass after warning); *Com. v. Sullivan*, 146 Mass. 142, 15 N. E. 491 (setting up and promoting lottery); *People v. Elmer*, 109 Mich. 493, 67 N. W. 550 (pretending to tell fortunes)."

And where distinct criminal acts form a series which is readily susceptible of proof, while proof of any particular act might be difficult, it is held that the state need not elect.

22 Cyc., 408 Paragraph E citing *State v. Higgins*, 121 Iowa, 19, 95 N. W. 244.
State v. Memmler, 75 Ga. 576.

This offense of wantonly wasting and destroying salmon and other food fishes would seem to come under these several heads of exception to the rule of election. All of the evidence was directed to a particular class and no other, the offense was continuous, and especially does the exception apply that these distinct criminal acts form a series which could be readily proved, while proof of the particular act was difficult. Under the view of the law held by the Court that a considerable number of fish would have to be wasted before a conviction would be warranted, it is difficult to select or elect the one that would come under the construction placed upon the law by the Court, and it was proper therefore to present the whole ser-

ies of acts, so that the jury might determine which would be regarded as a violation of the law under the instructions of the court. It follows if no election should have been required, the defendant cannot complain of error, and no error could be predicated on the election made for the reason before stated that it was within the discretion of the Court.

CLAIM OF INDEPENDENT CONTRACTOR NOT APPLICABLE.

Another assignment of error is that the witnesses for the Government, Hayward March and William J. Hunter were independent contractors and that the defendant could not be held liable for any wanton waste or destruction of salmon at a trap over which they exercised control. An inspection of the testimony will reveal the terms and nature of the contract.

The testimony of March and Hunter shows substantially that they went to Captain Williams, superintendent of the defendant's cannery at Kasiloff, Alaska, in April, 1913, to make arrangements in regard to the operations of a trap to be established at Kustatan, on the western shores of Cook Inlet, Alaska, and a verbal contract was entered into by which Captain Williams, representing and on behalf of the defendant corporation, agreed to furnish gear, netting and other materials for the construction of the trap, furnish scows as tenders therefor and for the purpose of holding the fish caught in the trap, and further agreed said defendant would call with its boats and take all of the fish of the trap. In accord-

ance with said agreement, the gear, netting, and other materials were furnished March and Hunter, they provided the poles therefor and performed the other work by which said trap was constructed. The defendant corporation provided scows, and upon the completion of the trap, the same was put in operation, and during the run of salmon, in the spring, the boats of the defendant corporation called regularly and took all the fish caught. In the latter part of July, 1913, July 24th, the big run of red fish which is usual to that region commenced, and upon its appearance Mr. Hunter started for the defendant's cannery at Kasiloff, on the morning of July 25th, 1913, and notified the cannery people, although it was not necessary according to the agreement entered into to give said notification. The boats of the defendant which usually called for the fish failed to call for several days to take the fish, and on July 28, 1913, there was some 2,000 fish wasted, both according to March's testimony on page 49 of Transcript of Record and the testimony of Captain Christiansen on behalf of the defendant on page 110 of Transcript of Record.

The witnesses for the prosecution, March and Hunter, positively stated that by the agreement made in the spring with Captain Williams, Superintendent of the defendant corporation, the latter was to take and call for all of the salmon caught in the trap. (See March's testimony on pages 28 and 29 of Transcript of Record, and Hunter's on page 70 thereof). The testimony of Captain Williams in but a slight measure conflicts with this part of the agreement, claim-

ing that the defendant was to take only such fish as they wished. (Direct Testimony, page 90 of Transcript of Record. But see his cross-examination on page 99, of the Transcript of Record, where he rather shuffles away from the question and in answer to the question put to him by the prosecution, does not directly say that he gave March and Hunter instructions about taking care of the surplus fish.)

We claim that under the law in question, to-wit: Section 266 of the Compiled Laws of Alaska, there is a duty imposed on any person, company or corporation, entering into any contract to take precautions to see that the law shall not be broken or disregarded, a duty which cannot be by any means or contract avoided or shifted. Considering for the sake of argument March and Hunter in the operation of the trap in the light of independent contractors, to the general rule exempting employers from liability, for the acts of independent contractors, there are well recognized exceptions. Among these exceptions, it is well recognized that where the law, or regulations, or the nature of the contract, impose a duty or an obligation upon the contractee, he cannot get rid of that duty or discharge that obligation by employing a contractor and shifting and transferring his liability or responsibility on such contractor.

See—

See Carico v. West Va. Central P. Ry. Co., W. Va. 86, 19 S. E. 571, 24 L. R. A. 50.
Fowler v. Saks, 7 L. R. A. 653.
Covington Bridge Co. v. Steinbrock, 76 Am. St. Rep. 375.

St. Louis & S. F. R. Co. v. Madden, 17 L. R. A. (N. S.) 791.
Colgrove v. Smith, 102 Cal. 220, 36 Pac. 44, 27 L. R. A. 590.
Woodman v. Metropolitan R. Co., 149 Mass. 335, 21 N. E. 482, 4 L. R. A. 213.
Ackles v. Pac. Bridge Co., 66 Or. 110, 133 Pac. 781.

These exceptions are set forth in 26 Cyc. commencing on page 1557, and while as there stated there is considerable conflict in authorities as to when the general rule applies and when the case is within the exception, we think under the circumstances surrounding the fishing industry in Alaska and the application of the statute, involved, that the view of the Court as expressed in the following instruction was a clear and eminently reasonable exposition of the law of the case:

> "The last two paragraphs are to be considered by you in connection with the following statement of the law concerning contracts for the trapping or catching of salmon, to wit:
>
> A cannery company may lawfully enter into a contract with any person to take all or any such part of the salmon caught in a trap or otherwise by such person, provided such person has opportunity, means or facilities for taking care of, using or disposing of any portion of the salmon remaining after the cannery company has taken such salmon as it wants, or such cannery company has no reason to doubt such is the case; but such contract cannot be lawfully made so as to relieve such cannery company from liability, if said cannery company, in making said contract, has knowledge that such person is using a trap which during the run of salmon will catch large numbers of salmon each tide, and such person

has no means, opportunity or facilities for using or disposing of said salmon, except to the cannery company entering into said agreement, by loading said salmon on boats furnished by such cannery company, and that if such cannery company does not call for said salmon with its boats, said salmon, or a considerable quantity thereof will have to be thrown away, wasted and destroyed, and so knowing, such cannery company fails to send for the salmon and a considerable quantity thereof has to be thrown away, wasted and destroyed in consequence." (Transcript of Record page 124.)

If a cannery company could simply make a contract without taking the precautions set forth in the instructions of the Court, it could shift all liability on those operating traps, and if in the heavy runs of fish there were no facilities for taking care of the same, a violation of the law would be invited and tacitly contemplated by such a contract.

There is nothing in the evidence showing that any precautions were to be taken or that any directions were given to take care of the surplus fish. March and Hunter were waiting for the defendant's boats to take the fish to the cannery and when the boats failed to come, and when no facilities had been provided to care for the fish, the result was the waste and destruction.

A contract that would contemplate the operation of a trap like the one in this case, and that would permit a cannery company to call or not with its boats for the fish or to call at uncertain times or according to its pleasure, would be against all reason and would simply be in the nature of a shift to escape liability

for the violation of the statute in this case, which would surely ensue. There is no merit, we therefore contend in this claim of exemption on the ground that March and Hunter were independent contractors, and the Court properly refused the instruction requested by the defendant, giving instead the instruction quoted above, which clearly shows the conditions and limitations that must surround any contract of the nature of the one revealed by the evidence in this case. See *Blanton v. United States*, 213 Fed. 326, for general rules for the refusal of instructions which would be misleading or improper, and also see the cases herein cited on this subject, which refused instructions on the ground of an exemption claimed on the score of the defense that the injury was done by independent contractors.

GOVERNMENT WITNESSES NOT ACCOMPLICES.

A further assignment of error is made that the Government's witnesses, March and Hunter, were accomplices, and that instructions to that effect should have been given by the Court.

An examination of the authorities is therefore pertinent to ascertain the general definition of an accomplice and the general rule for determining who is an accomplice with a view to the application to the present case.

An accomplice has been defined as one who knowingly, voluntarily, and with a common intent with the

principal offender unites in the commission of a crime.

Holmgren v. United States, 156 Fed. 444.
People v. Bolanger, 71 Cal. 19.
Whart. Crim. Evidence, 440.
State v. Clapp, 94 Tenn. 186.
State v. Roberts, 15 Oregon 197.
State v. Umble, 115 Mo. 461.
State v. Keller, 102 Ga. 511.
1 Am. & Eng. Ency. Law (2nd Ed.) 389.

In *State v. Roberts*, 15 Or. 197, the Court gives the following discussion of a definition of an accomplice:

> Webster defines an accomplice to be an associate in crime; a partner or partaker in guilt. Burrill's Law Dictionary defines the term thus: "One of several concerned in a felony; an associate in crime; one who co-operates, aids, or assists in committing it." This term includes all the *particeps criminis*, whether considered in strict legal propriety as principals or accessories.

And Wharton's Criminal Evidence, Volume 1, 10th Edition, Section 440, gives a definition as follows:

> An accomplice is a person who knowingly, voluntarily, and with common intent with the principal offender, unites in the commission of the crime. The co-operation in the crime must be real, not merely apparent. The co-operation must be voluntary; hence one who co-operates under fear of life or liberty is not an accomplice. The co-operation must be active; mere knowledge that a crime is to be committed is not generally sufficient to make the party an accomplice.

In People v. Coffey, 39 L. R. A. (N. S.) on page 707, the acts and facts which stamp a witness as an accomplice are given as follows:

> "Manifestly the single, sole determinative consideration is the part which the witness has borne in the crime perpetrated. If the witness has committed the crime, if he has knowingly aided and abetted in its commission, if he advised and encouraged its commission, the existence of any one of these facts admitted or established stamps his status as that of an accomplice."

Again in the same case in the same volume on page 710, the Court continues: "Wherever the commission of a crime involves the co-operation of two or more people, the guilt of each will be determined by the nature of that co-operation. Whenever the co-operation of the parties is a corrupt co-operation then always those agents are accomplices, even as at common law they were principals," and further on page 711, the Court says:

"This, then, is the true test and rule: If in any crime the participation of an individual has been criminally corrupt, he is an accomplice. If it has not been criminally corrupt, he is not an accomplice. In those cases where the concurrent act or co-operation of two people is necessary as in seduction, sometimes in abortion, and in the minor offenses of selling liquor, lottery tickets, or harmful drugs, the relationship of accomplice does not exist, because the co-operation of the other party is not denounced by law as criminally corrupt, and as a matter of fact need not be criminally corrupt."

See also *State v. Duff*, 144 Iowa 142; 122 N. W. 829

and the extensive note thereunder in 138 Am. St. Rep. page 270, giving definition of an accomplice and gen-

eral rule for determining who is an accomplice.

In the Duff case the court held that a prisoner is not an accomplice of a person outside the jail who assists him to escape.

In *United States v. Diggs*, 220 Fed. 545, it was held that women transported from one state to another for immoral purposes are not accomplices to the offense of transporting them and furnishing tickets for their transportation.

An inmate of a disorderly house was held not to be an accomplice with the keeper thereof. *State v. Stone* (Tex. Crim.) 85 S. W. 808.

An examination of the testimony and the contract or agreement entered into in this case, will demonstrate that the witnesses March and Hunter did not knowingly, voluntarily, and with a common intent unite with the defendant in the commission of the crime. Neither did they aid, assist, advise, or encourage in its commission, or act in concert with the defendant, or have any corrupt co-operation with the defendant in its commission.

They caught the fish in the trap, they waited for the promised boat of the defendant to come, and when it failed to come in time, the fish were wasted. The destruction of the fish was occasioned entirely by the failure and negligence of the defendant company, and it alone could be held liable and responsible for the violation of the law. Another consideration may be here presented. The testimony showed a clear violation of law, that a considerable number of salmon were wasted and destroyed on July 28, 1913,

at the trap in question. Who was liable therefor? Either the defendant corporation, or March and Hunter. In either case, the other would not be an accomplice of the party liable. They were on totally opposite sides, neither aiding or assisting or co-operating with the other. The indictment was against the defendant corporation, the facts were given to the jury, and a verdict was returned against the accused. There is no foundation, it seems to us, of the claim of the relationship of accomplice between the opposite sides. The witnesses March and Hunter can therefore withstand the test of the general rule to determine whether a witness is an accomplice to-wit: "Could the witness himself have been indicted for the same offense, either as principal or accessory."

State v. Duff, 144 Iowa 142; 122 N. W. 829.
State v. Jones, 115 Iowa 113; 88 N. W. 1066.
State v. Stone, 188 Ga. 705; 45 S. E. 630.
State v. Levering, 132 Ky. 666; 117 S. W. 253.

In such case, an instruction concerning the evidence of an accomplice would have been unwarranted and was properly refused.

Holmgren v. United States, 156 Fed. 444.
State v. Roberts, 15 Or. 197.

The further fact may be emphasized in this case that there was no error in refusing the instruction requested by the defendant to the effect that March and Hunter were accomplices of the defendant, for the reason that the instruction requested assumed by its language that they were accomplices, and was therefore an improper instruction to request.

The instruction requested is found on page 177

of the Transcript of Record, which was numbered as Defendant's Instruction No. 25, and in part is as follows. " * * * * * * then said two witnesses, William Hunter and Hayward March, are two accomplices of the defendant in said crime and you cannot find the defendant guilty on the testimony of such accomplices uncorroborated by any other evidence tending to connect the defendant with the commission of the crime."

Here is a clear assumption that the witnesses were accomplices, and as was held in *Holmgren v. United States*, 217 U. S. 523 it was not error to refuse an instruction which assumed a fact, and that is the general rule.

United States v. Dolan, 153 Fed. 52.

"WANTONLY" PROPERLY DEFINED.

A minor assignment of error is the objection to the definition given by the court of the word "wantonly" as the same appears in the statute. The Court's instruction concerning the same is as follows: "The word 'wantonly' as used in this statute means without excuse or justification; having a reckless disregard of consequences; heedless of results and the rights of others."

In *Strough vs. Central R. Co.* of New Jersey 209 Fed. 26, Judge Gray, as to the words "wanton" and "wilful," in cases of negligence says that the later authorities all agree that those words do not necessarily imply any purposeful design of the defendants to injure plaintiff, or in fact any one. They are applicable to all wilful conduct which is reckless of the

dangers that may ensue therefrom, and as to whether it was so was for the jury.

In *Cochin v. El Paso and S. W. R. Co.*, 108 Pac. 260 the following definition of "wanton" is given, as distinguished from "wilful":

> "An act is 'wilful where the resulting injury is intentional, or the natural and probable consequence of the act. The word 'wanton' is however, more comprehensive, and to constitute wantonness it is not essential that the injury should be intentional or the probable consequences of the wrongful act; it is sufficient that the act indicates a reckless disregard of the rights of others, a reckless indifference to the results, or that the injury is the likely and not improbable result of the wrongful act.
> The word 'wanton' does not mean 'wilful,' but reckless or heedless inattention to duty (*Kelly v. Stewart*, 93 Mo. App. 47).
>
> Any legal act is 'wanton' when it is needless for any rightful purpose without any adequate legal provocation and manifests a reckless indifference to the rights and interests of another.

State v. Brigham, 94 N. C. 888.
Hazle v. Railroad Co., 173 Fed. 431.
Natl. Folding Box Co. v. Robertson's Estate, 125 Fed. 524.
Cleveland C. C. & St. L. Ry. Co. v. Tartt, 64 Fed. 823.
Seago v. Paul Jones Realty Co., 170 S. W. 372.
Merrill v. Sheffield Co., 53 So. 219.
Adler v. Marit, 59 So. 597.
Vessel v. Seaboard Air Line Co., 62 So. 180.
Tolleson et al v. Southern Ry Co., 70 S. E. 311.
Cobb v. Bennett, 75 Pa. St. 326.
Welch v. Durand, 36 Conn. 182.

It will be seen that the definition given by the District Court went as far and was as complete and

comprehensive as the law requires, and that the error assigned is therefore without foundation.

For all the reasons herein given, that the indictment was sufficient, that there was no error in the election of the date of the commission of the crime, that the testimony of other violations of the law was proper to shed light on the whole situation, and to show motive ,intent, knowledge, purpose on the part of the defendant in the commission of the offense, that the defendant could not shift a duty resting upon it upon the witnesses for the government on the plea of independent contractors, and that said witnesses were not accomplices of the defendant, that the definition of wantonly was clearly sufficient, and finally because an inspection of the proceedings of the trial and the rulings and instructions of the Court will demonstrate that the defendant had a fair and impartial trial, the Government asks for an affirmance of the judgment rendered.

Respectfully submitted,

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